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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1290

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY,
*Petitioner,*

v.

JESSIE CODY, SALLIE MAE CODY, and all others similarly situated,
*Respondents.*

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA,
*Petitioner,*

v.

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON, and all others similarly situated,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Community Loan Corporation of Richmond County and Community Loan & Investment Corporation of Augusta pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 2, 1979.

## OPINIONS BELOW

The district court's rulings in this case are an order denying petitioners' motion to dismiss and cross-motions for summary judgment (Appendix A) and a memorandum opinion, findings, and conclusions after trial without a jury (Appendices B and C). The majority opinion of the court of appeals and the dissenting opinion of Chief Judge Brown are reported at 606 F.2d 499, 508, and reprinted as Appendix D hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix E) was entered on January 2, 1979. Petitioners were granted an extension within which to file a petition for rehearing and suggestion of rehearing en banc. Within that time, on April 2, 1979, a petition for rehearing and suggestion of rehearing en banc was filed, and was denied on December 11, 1979 (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the credit sale of an insurance policy by a licensed agent is the "business of insurance" within the meaning of Section 2(b) of the McCarran-Ferguson Act, so as to foreclose application of the Truth-in-Lending Act where it would "invalidate, impair, or supersede" state laws enacted to regulate such sales.

2. Whether a lender which makes Truth-in-Lending loan disclosures respecting a loan is required also to make different credit sale disclosures as to a portion of the loan proceeds disbursed to an insurance



company on behalf of the borrower to pay the first year's premium for an insurance policy.

3. Whether the Truth-in-Lending Act's penalty provisions authorize more than one penalty award on a single credit transaction involving multiple obligors.

## STATUTES INVOLVED

The federal statutes involved are the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* Pertinent portions of these statutes are printed as Appendices G and H, respectively. The federal regulation involved is Regulation Z of the Board of Governors of the Federal Reserve System, 12 C.F.R. § 226.1 *et seq.* Pertinent portions of this regulation are printed as Appendix I hereto. The state statutes involved are portions of Georgia's Insurance Code, Ga. Code Title 56, and Georgia's Insurance Premium Finance Company Act, Ga. Code Chapter 84-53. Pertinent portions of those statutes are printed as Appendices J through N. The state regulation involved is Chapter 120-2-12 of the Rules and Regulations of the Insurance Commissioner of the State of Georgia. This regulation is printed as Appendix O.

## STATEMENT OF THE CASE

The petitioners in these consolidated cases are licensed and regulated consumer finance lenders. They will be referred to in the singular as "Community." Community made loans to the respondents, making Truth-in-Lending disclosures appropriate for "consumer loan" credit under Section 129 of the Truth-in-Lending Act, 15 U.S.C. § 1639, and § 226.8(d) of Regulation Z of the Board of Governors of the Fed-

eral Reserve System, 12 C.F.R. § 226.8(d). (P. 84a, *infra.*)

At the time of the loan closings, the respondents applied for insurance policies covering certain health risks. These applications were supervised by employees of Community who were licensed by the State of Georgia as insurance agents. Portions of the loan proceeds were forwarded with the insurance applications to an unaffiliated insurance company, American Family Life Assurance Company, to cover the first year's premium for the policies. The insurance company approved respondents' applications and issued the policies directly to the respondents.

The respondents later filed class action suits, contending that the insurance transactions were "credit sales" by Community subject to Section 128 of the Truth-in-Lending Act, 15 U.S.C. § 1638 (pp. 69a-78a, *infra*) and that credit sale disclosures different from the loan disclosures actually made were required under § 226.8(c) of Regulation Z (pp. 83a-84a, *infra*) as to the small portion of the loan proceeds which accompanied the application as first year premiums. Respondents sought monetary awards, including penalties, under Section 130 of the Truth-in-Lending Act, 15 U.S.C. § 1640. (Pp. 76a-78a, *infra.*)

Community contended in the alternative (1) that the transactions were loans so that only loan disclosures were required and that such disclosures had been properly made, or (2) that if the insurance transactions were credit sales, they were sales of insurance and thus part of the "business of insurance," the regulation of which is reserved for Georgia's insurance laws by virtue of the McCarran-Ferguson Act.



The district court certified the cases as class actions under Rule 23 of the Federal Rules of Civil Procedure. It found the transactions in question to be credit sales of insurance, but held that the McCarran-Ferguson Act did not preclude the application of the Truth-in-Lending Act. It thus entered a class judgment in favor of respondents for Truth-in-Lending penalties. (Pp. 29a-38a, *infra.*)

Upon appeal to the Fifth Circuit Court of Appeals, this case was consolidated for argument with two similar cases, *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), and *Perry* v. *Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979).[1] The opinions in the three cases appear in sequence in the Federal Reporter, all having been decided by the same three-judge panel on the same day. Chief Judge Brown concurred in the result in *Cochran,* but dissented in *Perry* and in this case. The opinions of the court of appeals in *Cochran* and *Perry* are printed as Appendices P and Q, respectively. (Pp. 151a-233a, *infra.*)

In this case, the Fifth Circuit majority held that Community's employees, acting as licensed insurance agents of American Family, made credit sales of insurance and that Community was a "seller" under the Truth-in-Lending Act. (P. 44a, *infra.*) However, though it conceded that "the sale of an insurance policy is undoubtedly the 'business of insurance' for McCarran Act purposes," the majority nevertheless held that Community's credit sale of insurance policies was not protected by the McCarran Act. (P. 44a, *infra.*) On that basis, the court of appeals affirmed the district court. (P. 55a, *infra.*)

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[1] The *Perry* case is the subject of a petition for certiorari in this Court, No. 79-1225, filed February 7, 1980.

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals' Decision Has Created an Intercircuit Conflict as to Whether the McCarran-Ferguson Act Exempts Credit Sales of Insurance Policies by Insurance Agents from the Requirements of the Truth-in-Lending Act.

The United States Court of Appeals for the Seventh Circuit has decided the same McCarran Act issue as decided below in this case, reaching the opposite result. *See Lowe* v. *Aarco-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976) (per curiam).

In *Lowe*, an insurance broker selling automobile insurance arranged credit for his customers' premium obligations through a premium financing company. One of the purchasers of the policies filed a class action, alleging that the broker and the premium financing company failed to make credit disclosures required by the Truth-in-Lending Act. The district court dismissed the policyholders' suit on the basis of Section 2(b) of the McCarran-Ferguson Act, and the Seventh Circuit affirmed, holding:

> "[T]he credit sale of insurance policies by an insurance broker and a premium finance company [ ] constitutes part of the 'business of insurance' so as to be beyond the reach of the Truth in Lending Act." 536 F.2d at 1162.

The majority holding below is squarely in conflict with the Seventh Circuit's decision, as is evidenced by the majority's statement in *Cochran* that it "decline[d] to follow" *Lowe*. (P. 162a, *infra*.) The Fifth Circuit in this case held that Community's employees, as "licensed agents of [the insurer], made a credit sale of cancer insurance." (P. 44a, *infra*.) Nonetheless, applying its *Cochran* and *Perry* holdings, the



majority rejected Community's defense under the McCarran-Ferguson Act and proceeded to apply the Truth-in-Lending Act. (Pp. 44a, *infra*.)

The law in the Fifth Circuit is thus that the credit sale of an insurance policy by an insurance agent is subject to the Truth-in-Lending Act, while the law of the Seventh Circuit is to the contrary. This conflict in the application of the McCarran-Ferguson Act is irreconcilable and should be resolved by this Court.

### II. By Misapplying the Applicable Decisions of this Court, Including *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court of Appeals' Decision Has Emasculated Section 2(b) of the McCarran-Ferguson Act.

Even without regard to the direct conflict in the circuits created by the decision below, this case merits review by this Court. This is so because the lower court misapplied the decisions of this Court construing the McCarran-Ferguson Act, robbing that Act of the force that Congress intended—and this Court has held—it to have.

The McCarran-Ferguson Act is the product of an historical process closely tied to the development of this Court's jurisprudence under the Commerce Clause of the Constitution.[2] Beginning shortly after the Civil War, and continuing for seventy-five years, it was assumed that "[t]he business of insurance is not commerce." *Hooper* v. *California*, 155 U.S. 648, 655 (1895) (citing the seminal case of *Paul* v. *Virginia*, 75 U.S. (8 Wall) 168, 183 (1868)). It was thus widely believed that Congress was powerless to regulate the

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[2] This history is recounted in Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 413-18 (1946).

business of insurance under the Commerce Clause and that the Commerce Clause did not affect the validity of state insurance regulation and taxation. Consequently, as the insurance industry grew in the nineteenth and early twentieth centuries, the states developed comprehensive systems for regulating and taxing it.

This settled view of the division between state and federal power in the field of insurance was shattered by the Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Following a more modern approach to the Commerce Clause, the Court held in *South-Eastern Underwriters* that the business of insurance is subject to congressional powers over interstate commerce. Not surprisingly, the decision provoked widespread uncertainty about the continued validity of the varied state systems of insurance regulation and taxation and about the impact on the state systems of Congress' past and future exercises of its supreme lawmaking powers under the Commerce Clause.

The McCarran-Ferguson Act was passed in 1945 to dispel this uncertainty by emphatically supporting continued state regulation of insurance. This Court promptly gave effect to that clear congressional purpose, observing that the Act was designed "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 429 (1946) (state tax on non-resident insurer not invalid under the Commerce Clause).[3]

[3] More recent affirmations of this purpose of the McCarran-Ferguson Act may be found in Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218, n.18 (1979) ("the primary purpose of McCarran-Ferguson was to preserve state regulation of the activities of insurance companies"), and SEC v. National Securities, Inc,. 393 U.S. 453, 459 (1969) ("the McCarran-Ferguson Act was an attempt . . . to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation").



One of the primary vehicles for achieving this purpose is the first clause of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b), which provides that state laws "enacted . . . for the purpose of regulating the business of insurance" may not be "invalidate[d], impair[ed] or supersede[d]" by any Act of Congress, unless such Act "specifically relates" to the business of insurance or is made operative by another provision of the McCarran-Ferguson Act.[4] This provision is the bulwark that protects state insurance systems against the overriding effect of the myriad statutes Congress has enacted to regulate various aspects of interstate commerce. Without this provision, integrated state regulation of insurance would be difficult, because portions of the states' regulatory schemes would be subject to attack as preempted whenever they conflicted with the requirements or objectives of the multitude of federal statutes and regulations touching upon interstate commerce.

[4] The second clause of Section 2(b), the so-called antitrust proviso, in conjunction with Section 3 of the Act, is addressed particularly to the effect of the Sherman Act, Clayton Act, and Federal Trade Commission Act on the "business of insurance." 15 U.S.C. §§ 1012(b), 1013. These sections have been construed by this Court on several occasions. See Group Life & Health Ins. Co. v. Royal Drug Co., supra; St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960); FTC v. National Cas. Co., 357 U.S. 560 (1958).

Section 4 of the Act subjects the "business of insurance" to the full effect of the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act. 15 U.S.C. § 1014.

The proper approach to applying Section 2(b) is exemplified by the leading case on its construction, *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453 (1969). Section 2(b) is typically invoked, as it was in *National Securities,* when a party relies on state law to avoid the application of the federal statute. If the federal statute is not excepted from the operation of Section 2(b),[5] the inquiry proceeds in two steps: whether the state law on which the party relies was "enacted . . . for the purpose of regulating the business of insurance," and, if so, whether such state law would be "invalidate[d], impair[ed], or supersede[d]" by application of the federal statute. *See National Securities,* 393 U.S. at 457-58, 463.

Accordingly, the first inquiry that the lower court should have made is whether the state laws on which Community relied were "enacted . . . for the purpose of regulating the business of insurance." On this issue, *National Securities* provides authoritative guidance: state laws enacted "to secure the interests of those purchasing insurance policies" are protected by Section 2(b). *See* 393 U.S. at 460. Here, Community has consistently relied on Georgia statutes — including Georgia's comprehensive Insurance Code — that are expressly addressed to the purchase of insurance policies and to the "activities of insurance companies in dealing with their policyholders," 393 U.S. at 459.[6]

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[5] *See* note 4 above, and accompanying text. In Cochran v. Paco, the Fifth Circuit expressly found no exception for the Truth-in-Lending Act. (P. 58a, *infra.*)

[6] Georgia's Insurance Premium Finance Company Act, Ga. Code Ann. § 84-5301 *et seq.* (pp. 85a-95a, *infra*) requires specific credit disclosures closely akin to those contained in the Truth-in-Lending Act. *Id.* § 84-5309. (Pp. 91a-92a, *infra.*) However, by explicit legislative exemption, insurers authorized to do business in Georgia and "any licensed resident local agent as to premiums on business produced by such agent" are excused from compliance with the Insurance Premium Finance Company Act. *Id.* § 84-5302(a). (P. 85a, *infra.*) Moreover, a separate provision expressly exempts sales of sickness insurance from the premium financing disclosure requirements. *Id.* § 84-5302(e). (Pp. 85a, *infra.*)

Sales of sickness insurance by insurance companies and local agents are regulated under the Georgia Insurance Code, Ga.Code Title 56. (Pp. 97a-131a, *infra.*) The Code generally proscribes any "unfair or deceptive act or practice." *Id.* § 56-701 *et seq.* (Pp. 97a-100a, *infra.*) An agent's license can be suspended or revoked for misrepresentations. *Id.* § 56-813a. (Pp. 102a-103a, *infra.*) Every insurance contract must specify the premium and premium payment terms. *Id.* §§ 56-2413(2)(e) and (3). (P. 107a, *infra.*) In addition, the Insurance Code contains a Chapter specifically addressing individual accident and sickness insurance, *id.* § 56-3001 *et seq.* (pp. 109a-131a, *infra*), including provisions requiring the insurer to state the "entire money and other considerations" required to be paid for the insurance. *Id.* § 56-3002(1). (P. 110a, *infra.*) The Insurance Commissioner must approve all policy and application forms, and such documents must specify premium payment terms. *Id.* § 56-2410, 2413(2)(e) and (3). (Pp. 105a-106a, 107a, *infra.*)

Finally, the Georgia Insurance Commissioner has promulgated regulations specifically governing the advertising of accident and sickness insurance, Chapter 120-2-12 (pp. 133a-150a, *infra*), including a provision prohibiting misleading omissions about the "premium payable." *Id.* § 120-2-12-.06(1). (P. 138a, *infra.*)



Although it paid lip service to *National Securities,* the lower court failed to follow the path set out in that case. Indeed, the court's reasoning indicates a complete unawareness that Section 2(b) is designed to protect state insurance schemes. The court of appeals instead approached Section 2(b) as if its purpose were to prevent the application of federal statutes only to certain core functions of insurance companies.

This misstep is readily apparent in the court of appeals' opinions in the companion cases of *Cochran* v. *Paco, Inc., supra,* and *Perry* v. *Fidelity Union Life Insurance Co., supra,* which formed the basis for its

holding in this case. (Pp. 43a-44a, 162a-163a, 170a-171a, *infra.*) The court restricted the holding in *National Securities* to cover only activities affecting "the type of policy which could be issued, [and] its reliability, interpretation, and enforcement," quoting *National Securities,* 393 U.S. at 460. (P. 163a, *infra.*) Taking this narrow view, the court isolated the financing aspect of credit sales of insurance policies by insurers and their agents and labelled it as merely "peripheral" or "ancillary" to the concern of Section 2(b). (Pp. 44a, 164a, *infra.*) The lower court's opinion thus opens state regulation of the dealings between insurers and their customers to piecemeal attacks by decreeing that some elements of those dealings may be unprotected by Section 2(b).[7]

Had it followed the teachings of *National Securities,* the court of appeals would have recognized that the Georgia laws on which Community relies are laws enacted for the purpose of regulating the dealings between insurers and their customers and thus are protected by Section 2(b) and that the application of the Truth-in-Lending Act would impair or supersede them by imposing requirements that Georgia has deliberately chosen not to adopt.[8]

[7] Even if this selective approach were proper, the extension of credit by insurers and their agents to enable or induce people to buy insurance policies cannot be deemed a merely "ancillary" aspect of insurance transactions. Advertising by insurers and agents similarly induces the purchase of insurance policies, and such advertising has been recognized to be a part of the "business of insurance" since the Court's decision in FTC v. National Cas. Co., *supra. See also* Dexter v. Equitable Life Assurance Soc'y., 527 F.2d 233, 235 (2nd Cir. 1975) (tying purchase of life insurance to mortgage loan as method of inducing the purchase of policies "an integral part of 'the business of insurance' "); Addrisi v. Equitable Life Assurance Soc'y., 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975) (same). Chief Judge Brown made the same point in his dissent in *Perry.* (Pp. 186a-187a, *infra.*)



It is instructive to consider the extreme to which the lower court went to apply a federal statute in derogation of Georgia insurance law. It first split a "consumer credit sale" into two parts. Though acknowledging that one part—the "sale"—is "undoubtedly the 'business of insurance' " and thus reserved for state insurance regulation (p. 44a, *infra*), it held that the other part—the type of sale ("consumer credit")—is *not* part of the business of insurance. The court then put the two parts back together to find liability, since without both parts—that is, without a "consumer credit sale"—no Truth-in-Lending Act violation could have been found.

In his dissent, Chief Judge Brown recognized the inconsistency in this position:

> "The transaction was a credit sale. This is a species of sale, but a sale nonetheless, Although the McCarran Act is as inscrutable as Mona Lisa in many respects, there is one principle upon which the Court and I agree: the sale of an insur-

[8] As Judge Brown said in dissent, the Fifth Circuit's majority opinion would:

> "not only be superimposing additional requirements . . . but . . . construing TIL to invalidate completely the Georgia exemptions in direct contravention of § 2(b). We can think of no clearer 'conflict', to use the District Court's term, than exists where a state has *affirmatively* relieved insurance companies and their agents and certain premiums from credit disclosure requirements. The nonaction—purposeful and non-inadvertent—that is expressly legal for an insurance agent in Georgia would be expressly illegal under federal law. TIL's application would thus amount to invalidation with a vengeance and reduce McCarran to a nullity." (Pp. 60a-61a, *infra.*) (Emphasis in original.)

ance policy is squarely within the 'business of insurance,' as is the licensing of agents, *ante,* 606 F.2d at 503. *SEC* v. *National Securities, Inc.,* 1969, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668. Therefore, McCarran should exempt the defendants from TIL if TIL would invalidate, impair or supersede applicable Georgia law." (P. 56a, *infra.*)

Chief Judge Brown then said that even if the transaction could properly be bisected, the "financing" of the sale of insurance is also part of the business of insurance:

> "Second, even if I could agree with the Court that the issue here is financing, separate and apart from the sale of insurance, I would still disagree with their result for reasons stated in my dissent in *Perry, ante,* 606 F.2d at 475-478. The Court has assumed that Community was an insurance seller. I am convinced that financing of premiums by the one selling the insurance is part of the 'business of insurance' which is covered by the McCarran Act. When an insurance seller offers premium financing in conjunction with the sale of insurance, this financing is an inducement to the purchaser to buy. It is such an integral part of the actual sale that the insurer-insured relationship, emphasized in *National Securities,* 393 U.S. at 460, 89 S.Ct. 564, is directly involved. This is the 'business of insurance' which McCarran exempts from federal control." (Pp. 56a-57a, *infra.*)

The impact of the majority opinion in this case is clear: the "business of insurance," insofar as the sale of insurance is concerned, has been dissected into those parts which are reserved for state insurance regulation because of the McCarran-Ferguson Act and



those which are not. The same process could be used to apply any federal statute to sales of insurance. All that is required is that the particular type of sale be deemed not to be the business of insurance. Such an approach undermines Congress' broad mandate that *all* of the business of insurance is reserved for state insurance regulation.

### III. The Court of Appeals' Decision Overlooks a Specific Provision of Regulation Z of the Board of Governors of the Federal Reserve System.

At the time of the credit transactions in this litigation, Community made Truth-in-Lending disclosures required for loans. Georgia law governing the type of loan in question is complex, resulting in complex disclosures. *See* Ga. Code Ann. Chap. 25-3. The form of the Touchstone transaction is illustrative, and appears in the Fifth Circuit's opinion in this case. (P. 45a, *infra.*) It shows twenty-five separate loan disclosures, only the next to last of which is involved in this litigation:

"Check payable to American Family Life Assurance Comp. ..... $ 60.00"

There is a provision in the *loan* disclosure section of the Truth-in-Lending Act requiring disclosure, in connection with a *loan,* of the amount of credit that was was "paid to the customer, or for his account or to another person on his behalf." 12 C.F.R. § 226.8 (d)(1). (P. 84a, *infra.*) The itemization showing the "check payable to American Family Life Assurance Comp." is in clear compliance with that regulation. In other words, the regulations set out a procedure for disclosing the disbursement of the insurance prem-

ium to a third person on behalf of the borrower, and Community complied with that procedure. The Fifth Circuit, however, found a Truth-in-Lending violation in Community's failure, either in addition to or in substitution for that disclosure, to extract this $60.00 item from the overall loan transaction and make different "credit sale" disclosures concerning it.

To reach this result, the Fifth Circuit majority (1) brushed aside state law to avoid what it termed "a hypertechnical interpretation of 'seller' or 'sale' based on state law . . ." (p. 50a, *infra*); (2) "pierced corporate veil[s] to avoid 'work[ing] an injustice'" (p. 52a, *infra*); and (3) gave no consideration to the specific regulation of the agency charged with administration and supervision of the Act, contrary to the direction of this Court.[9] In short, rather than applying the plain language of Regulation Z concerning the disclosure required where loan proceeds go to a third person, the Fifth Circuit created a novel theory upon which to base Community's liability to the members of the class.

This type of innovative judicial construction may have helped to stimulate the burgeoning load of Truth-in-Lending litigation in the federal courts, and particularly in the Fifth Circuit. In 1972 there were 415 such suits nationwide; in 1979 there were 2,300. In the Fifth Circuit, the number of such suits increased from 162 in 1972 to 1,077 in 1979, 46 percent of all Truth-in-Lending suits filed in the United States in that year. The district courts in Georgia alone were

[9] Udall v. Tallman, 380 U.S. 1 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).



the origin of 685 such filings in 1979, 29 percent of the *nationwide* total.[10]

Ever-expanding standards for creditor liability, as exemplified by the Fifth Circuit's decision in this case, cause enormous uncertainty among creditors and the public and induce the filing of more and more suits under the Act. This case presents an opportunity for this Court to set guidelines for the Act's construction and application.

### IV. The Court of Appeals' Decision Awarding Multiple Penalties on a Single Transaction Has Created a Second Intercircuit Conflict.

The Fifth Circuit's opinion in this case is unusual, in that it causes two separate intercircuit conflicts. The first was discussed in Part I above. The second involves the Court's application of Truth-in-Lending penalties. The Fifth Circuit's approach is to multiply the penalty for a single transaction by the number of borrowers involved in the transaction. That approach is squarely contrary to the approach taken by the Fourth Circuit Court of Appeals, which is to penalize the lender once on each transaction where an improper disclosure occurs.

The Truth-in-Lending penality statute applicable to this litigation is as follows:

> "(a) Except as otherwise provided in this Section, any creditor who fails in connection with

[10] The statistics in this paragraph are from the 1976 Annual Report of the Administrative Office of the U.S. Courts (Table 33, Page 200) and the 1979 Annual Report of the Administrative Office of the U.S. Courts (Table 29, page 70). These reports are for the 12-month period ending June 30 for the year concerned in the report.

> any consumer credit transaction to disclose to any person any information required under this Chapter to be disclosed to that person is liable to that person in an amount equal to the sum of (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100.00, nor greater than $1,000.00; and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with the reasonable attorney's fees as determined by the court." [11]

Some of the credit transactions in this litigation involve notes on which there are two (or more) obligors. The Fifth Circuit majority held that, even though there was but one credit transaction, and even though Regulation Z requires disclosure to only one of multiple obligors, 12 C.F.R. § 226.6(d) (p. 79a, *infra*), Community was liable for the entire statutory penalty to *each* of the multiple obligors in each of the transactions. (P. 55a, *infra.*)

This multiplication of penalties on a single transaction is in direct conflict with the decision of the Fourth Circuit Court of Appeals in *Powers* v. *Sims and Levin,* 542 F.2d 1216 (4th Cir. 1976). There, the court of appeals held that the Truth-in-Lending Act

[11] This provision was amended in 1974 by Pub. L. No. 93-495, Title IV, Section 408(a) (October 28, 1974), 88 Stat. 1518. However, the penalty section above quoted is still part of the law. The change that was made in 1974 affected the manner in which "class" penalties should be assessed. *See* 15 U.S.C. § 1640(a)(2)(B). (P. 76a, *infra.*) Though this case was certified as a class action after the amendment, the parties stipulated that the previous law would be applicable, so that the "non-class" penalty provisions are pertinent to this litigation. *See* 15 U.S.C. § 1640(a)(2)(A). (P. 76a, *infra.*)



authorizes only a single penalty per transaction and that penalties are not to be multiplied merely because there was more than one obligor on a transaction. In reaching this result, the Fourth Circuit considered the legislative history, particularly the pertinent House Report:

> " 'Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the amount of the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on *any individual credit transaction.*' 1968 U.S. Code Cong. and Adm. News p. 1976 (Emphasis Added)." 542 F.2d at 1219.

The anomalous result that in one circuit a creditor faces a single penalty per transaction, while in another circuit he faces a penalty which is multiplied by the number of obligors in a transaction, should be corrected by this Court.

**V. The Issues Presented by this Case Are Significant Questions of Federal Law.**

This case presents fundamental issues concerning the interpretation and administration of two significant federal statutes, as well as two separate intercircuit conflicts.

For thirty-five years, pursuant to Congressional design, the McCarran-Ferguson Act has nurtured and protected a pervasive system of state regulation of insurance. Under state regulation, that industry has become one of the Nation's largest, with 1976 premiums in excess of 127 billion dollars. Insurance Information Institute, *Insurance Facts* 9 (1978 ed.).

Although comprehensive statistics regarding the volume of insurance sold on credit do not appear to be available in published form, a Federal Reserve Board Study indicates that, in only seven states, more than 375 million dollars in premiums were financed during 1975. Amicus Brief of the Federal Reserve Board in *Cochran* v. *Paco,* 606 F.2d 460 (5th Cir. 1979), Table I. Thus, the McCarran-Ferguson Act issue in this case—whether federal regulation shall supersede state insurance regulation with respect to certain sales of insurance (here, credit sales)—is of enormous significance both to the insurance industry and to the consuming public. More important, it has far-reaching implications for state regulators and for our federal system of government.

The Truth-in-Lending Act is a recent exercise of Congress' powers under the Commerce Clause to regulate in detail an array of business practices. The increasing significance of this statute and its growing impact on the daily affairs of this Nation are suggested by the dramatic growth in Truth-in-Lending litigation in the federal courts—to over 2,000 such suits in 1979—as discussed in Part III above. The Truth-in-Lending questions presented by this case—whether the Truth-in-Lending Act applies at all to the sale of insurance, the propriety of multiple penalties for a single violation, and the necessity of credit sale disclosures in a loan transaction—are recurring and important.



## CONCLUSION

The petition for a writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted,

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February 20, 1980

# Appendices

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Civil Action No. 1863

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs*

vs.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant*

Civil Action No. 1864

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs*

vs.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant*

### ORDER

(Filed February 28, 1975)

This class action arises as a result of alleged violations of the disclosure requirements for credit sales under the Truth-in-Lending Act, 15 U.S.C. § 1601, *et seq.* Jurisdiction is founded on § 130e of the Act, 15 U.S.C. § 1640(e), and 28 U.S.C. § 1337. The case is now before this Court on defendants' motion to dismiss for failure to state a claim, and on both parties' motions for summary judgment.

The relevant facts are undisputed. Both defendants are corporations engaged in the business of lending money in Richmond County, Georgia. During 1973, plaintiffs entered

into business transactions with the defendants consisting of loans of money under the Georgia Industrial Loan Act, Ga. Code Ann. § 25-301, *et seq.* In making these loans, defendant complied with the requirements of the Truth-in-Lending Act regarding consumer loans; however, plaintiffs allege that credit sale disclosures required under the Act should have been made with respect to a portion of the loan proceeds used to finance cancer insurance policies plaintiffs claim defendants sold them. The policies in question were issued by the American Family Life Assurance Company of Columbus, Georgia (American Family). Defendants' loan managers, acting as insurance agents for American Family Life, took applications for the insurance after the defendants loaned plaintiffs certain sums of money. Sixty dollars of the loan proceeds for family insurance coverage or forty dollars for single coverage was used as the premium payment to American Family and was submitted along with the plaintiff's application. The plaintiffs' only contact in regard to their purchase of the cancer insurance policies was with defendants' loan managers on the loan office premises. The President of defendants, Community Loan & Investment Corporation of Augusta and Community Loan & Investment Corporation of Richmond County, Mr. William W. Murphy, Jr., established policies and procedures to be followed by the defendants' employees in handling the cancer insurance, and gave final approval to American Family to license defendants' loan managers as insurance agents for American Family. The cancer insurance program was initiated in the latter part of 1972, but was temporarily terminated by Mr. Murphy in April or May of 1973 because he was not satisfied with it. Later that year, however, Mr. Murphy made the decision to permit the program to begin again.

Defendants' motion to dismiss is based entirely on its contention that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, precludes application of the Truth-in-Lend-



ing Act to these transactions.[1] Specifically, defendants assert that the sale of insurance is part of the business of insurance and is, therefore, within the scope of the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969) (the selling and advertising of insurance policies is covered by the McCarran-Ferguson Act). Consequently, since the State of Georgia has adopted laws comprehensively regulating the business of insurance, defendants conclude that the McCarran Act takes the transaction in question outside the scope of the Truth-in-Lending Act.

However, defendants cite no Georgia legislation specifically overriding or superseding the Truth-in-Lending Act, nor do they demonstrate how application of this Act would interfere with state legislation. Moreover, research reveals that the only Georgia statute directed toward disclosures accompanying sales of insurance exempts all insurance companies and their local agents from its coverage. Ga. Code Ann. §§ 84-5302 and 84-5309. Therefore, no conflict exists between requirements under Georgia law and under the Truth-in-Lending Act. And even if the State of Georgia had passed legislation requiring dis-

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[1] The McCarran-Ferguson Act states in relevant part:

"Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012.

closures in the sale of insurance, the Truth-in-Lending Act could not be interpreted as invalidating, impairing, or superseding state law since section 111 of the Act specifically provides that "[t]his title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of the State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of their inconsistency." 15 U.S.C. § 1610(a). Consequently, the Federal Reserve Board has determined that the credit sale of insurance is governed by the Truth-in-Lending Act.[2]

Logic also dictates the rejection of the defendants' position. To apply the McCarran-Ferguson Act as broadly as defendants suggest would effectively bar the application of any federal statute relevant to the business activities of insurance companies regardless of whether state legislation covered the specific transaction in question or not. This interpretation justifiably has not been accorded the McCarran Act by federal courts in other contexts. *E.g., Atlantic & Pacific Insurance Co. v. Combined Ins. Co.*, 312 F.1d 513, 515 (10th Cir. 1962); *Sears, Roebuck & Co. v. All States Life Insurance Co.*, 246 F.2d 161, 172 (5th Cir. 1957); *Zachman & Erwin*, 186 F. Supp. 691, 694 (S.D. Texas 1960).

[2] A Federal Reserve Board letter provides:

"This responds to your letter of August 7, 1969 and to * * *'s of September 8, 1969, both of which inquired as to what type of disclosures an insurance broker or agent who handles the insurance and finances the premium could make. In our opinion, an insurance agent is selling insurance. Consequently, when he also provides consumer credit for premium financing, he is making a credit sale under § 226.2(n) (¶ 3510) and disclosures under § 226.8(b) (¶ 2567) would be required."

CCH Consumer Credit Guide ¶ 30,257 (transfer binder) (excerpts from F.R.B. Letter of January 5, 1970, No. 225 by Frederic Solomon, Director).



Nevertheless, defendants cite two federal district court opinions, *Gerlach v. Allstate Ins. Co.*, 338 F. Supp. 642 (S.D. Fla. 1972) and *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974), as support for their argument that the McCarran Act bars application of the Truth-in-Lending Act under the facts in this case. In *Gerlach, supra,* the Court for the Southern District of Florida in *dictum* stated that to apply the Truth-in-Lending Act requiring extensive disclosures not required under Florida law to premium financing would violate the McCarran Act. *Id.* at 650. The court focused on a Florida statute setting forth all disclosures required in a premium financing agreement and stated that the only material question with respect to the application of the McCarran Act is whether any state regulation on the same subject as the Truth-in-Lending Act exists. *Id.* Therefore, even though the state legislation was not identical to the relevant provisions of the Truth-in-Lending Act, the Court concluded that such legislation precluded the application of the federal legislation. In *Ben v. General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974), the Court for the District of Colorado stated even more broadly that since state legislation occupied the field of regulating activities of insurance companies "in a comprehensive manner," the Truth-in-Lending Act could not apply to the insurance industry. *Id.* at 1201.

Whatever the merits of these holdings with respect to Florida and Colorado state legislation, this Court cannot agree that once a State undertakes to regulate the insurance industry, no federal legislation can apply unless it specifically relates to the business of insurance.[3] As plaintiffs point out, and as the Georgia Code makes clear, Georgia legislation does not comprehensively regulate the

[3] *See* 15 U.S.C. § 1012(b). Because of this Court's holding with respect to the applicability of the McCarran-Ferguson Act, it is unnecessary to consider plaintiffs' contention that Truth-in-Lending relates specifically to the business of insurance.

financing of insurance premium. In fact, the State of Georgia has absolutely no legislation comparable to or even vaguely resembling the Truth-in-Lending Act. The only statute applicable to the sale of insurance is Ga. Code Ann. § 84-5309, which does not cover domestic insurance companies and their agents. *See* Ga. Code Ann. § 84-5302. In light of these facts, this Court cannot hold that the Truth-in-Lending Act invalidates, impairs, or supersedes applicable state legislation regulating the business of insurance. Accordingly, defendants' motion to dismiss on this ground must be denied.

Turning now to the parties' cross-motions for summary judgment, it appears that the basis of their disagreement as to the applicability of the Truth-in-Lending Act rests on whether defendants are sellers within the meaning of the Act. According to the definition of a credit sale in 15 U.S.C. § 1602(g), three elements must be present before a defendant can be held accountable for failing to make the disclosures required under that section: (1) there must be a sale; (2) consumer credit must be extended or arranged by the defendant; and (3) the defendant must be a seller. In the present case, a sale occurred since the purchase of insurance constitutes a sale as the term is used in the Truth-in-Lending Act. *Stefanski v. Mainway Budget Plan, Inc.*, 456 F.2d 211 (5th Cir. 1972). Moreover, defendants have admitted that credit was extended or arranged by them for plaintiffs. Thus, the only remaining question is whether the third requirement for liability—that defendants are sellers—has been met under the facts in this case.

Plaintiffs argue for an application of a "proximate cause" test to determine whether defendants are sellers of cancer insurance. Plaintiffs assert that if the Court uses this standard in analyzing defendants' actions with respect to the transactions in question, summary judgment must be granted in their favor because there is no substantial question of fact regarding causation. Specifically, plaintiffs contend that this Court must find as a matter of law that the defendants themselves were substantial factors in bringing about the alleged sale, or alternatively, that defendants' loan managers were the proximate cause of the sales and since they were acting within the scope of their employment with the defendants when they sold the insurance, their acts are attributable to the defendants.



Defendants, on the other hand, strenuously argue that a sale of insurance does not occur until the insurance company actually accepts the application from its agent. Pointing to numerous Georgia cases holding that a contract of insurance does not arise until the application is approved by the company, defendants assert that all that took place in this case was "the transmission to the insurance company of an offer by the prospective insured to purchase the insurance, which offer could be withdrawn by the plaintiffs at any time . . . ." Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendants' Motion for Summary Judgment, pp. 16-17. Therefore, defendants contend that since there was no sale of insurance by defendants' loan managers, defendants could not be sellers within the meaning of the Truth-in-Lending Act.

Upon consideration of the defendants' arguments with respect to this issue, this Court cannot agree that defendants were not sellers for the reason that no contract arose until the time the plaintiffs' applications were accepted. Whatever the effect accorded the transactions by state law, a Federal Reserve Board letter directly on point clearly states that "an insurance agent is selling insurance" for purposes of the Truth-in-Lending Act.[4] CCH Consumer

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[4] *See* F.R.B. letter, note 2 *supra*. Defendants' attempts to distinguish this letter on the grounds that it is "factually inapposite in that the agent in the case at bar did not 'finance the premiums' " and that it is "ambiguous in its use of the phrase 'handles the in-

Credit Guide ¶ 30,257 (transfer binder) (letter of Jan. 5, 1970, No. 225 by Frederic Solomon, Director). As the defendants themselves note in their motion for summary judgment, the interpretation which the Federal Reserve Board accords the Truth-in-Lending Act in its opinions is entitled to great weight by the courts "because of the important interpretive and enforcement powers granted this agency by Congress . . . ." *Bone v. Hibernia Bank,* 493 F.2d 135, 139 (9th Cir. 1974); *See Philbeck v. Timmers Chevrolet, Inc.,* 499 F.2d 971, 976 (5th Cir. 1974). Hence, the Board's decision on the applicability of the Truth-in-Lending Act to insurance agents is very persuasive evidence against defendants' position.

Also persuasive is the fact that in the present case applications to the insurance company provided no information upon which the company could choose to reject them, and in fact, no class member's application was apparently rejected. Thus, the final step in the consummation of the sales transactions in question was a mere formality. To hold that an insurance agent is not a seller for the reason that the insurance company merely has the legal

surance' and is not directed to any specific fact situation'' are unconvincing. First, from the clear wording of the letter itself there is no question that the Federal Reserve Board regarded an agent as engaged in the business of selling insurance whether or not he finances the premiums. If an agent finances the premiums, he has conducted a *credit* sale governed by the Truth-in-Lending Act. However, even if he does not finance the premiums, he still sells the policy to the applicant. Secondly, the use by the Federal Reserve Board of the phrase ''handles the insurance'' does not appear to be critical or to take the present case outside the scope of the 1970 letter. Moreover, the cases which defendants cite as demonstrating that state law concepts as to the definition of a credit sale should control are clearly distinguishable from the present case because they relate only to the time at which a sale is consummated and not to what constitutes a credit sale. *See F.R.B.* Opin. Letter, November 23, 1971, CCH Consumer Credit Guide ¶ 30-769; F.R.B. Opin. Letter June 4, 1970, CCH Consumer Credit Guide ¶ 30,399.



right to reject submitted applications when the company does not participate at all in the merchandising of the insurance is to ignore reality.[5]

In addition, policy considerations require the rejection of defendants' position. The purposes of the Truth-in-Lending Act as stated in the Act itself is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . . ." 15 U.S.C. § 1601. To effectuate this purpose, the terms "seller" and "credit sale" should not be given restrictive, unrealistic interpretations which ignore the sense in which the words are employed in the Act. In the present case, the purchaser decided whether to buy the cancer insurance at the time the insurance agent described its provisions to him. Had the insurance company rejected an application, it would have been subsequent to any interaction between the purchaser and a representative of the company. Consequently, the credit sale disclosures should logically have been made before the company received the application from its agent.

Thus, since a sale of insurance for purposes of the Truth-in-Lending Act does not depend on whether the insurance company has the right to accept or reject applications from its agents, the issue becomes whether defendants in this case should also be held as sellers. Unfortunately, this Court is not aware of any cases expressly concerning the question of who is a seller for purposes of

[5] Defendants also cite two F.R.B. opinions which they claim give ''controlling support to the propriety of the loan disclosures made by these defendants.'' F.R.B. Opin. Letter, July 9, 1970, CCH Consumer Credit Guide ¶ 30,551; F.R.B. Opin. letter, June 4, 1970, CCH Consumer Credit Guide ¶ 30,399. However, neither of these opinions involved a factual situation in which the financer and seller were the same entity; and hence, there was no question presented as to whether the financer should have disclosed the information required under the Truth-in-Lending Act for a credit sale.

Truth-in-Lending. Plaintiffs, citing two Fifth Circuit cases involving Securities Act violations, *Lewis v. Walston & Co.*, 487 F.2d 617, 621-22 (5th Cir. 1973), and *Hill York Corp. v. American Int'l Franchises, Inc.*, 448 F.2d 680, 692-93 (5th Cir. 1971), argue that a proximate cause or substantial factor test ought to be used. *See also Lennerth v. Mendenhall,* 234 F. Supp. 59 (N.D. Ohio 1964). Defendants, on the other hand, contend that this type of standard is too broad to be employed in a Truth-in-Lending context and that the policies and purposes of the 1933 Securities Act differ so significantly from the policies and purposes of Truth-in-Lending that principles developed in one should not be applied to the other.

Upon examination of the cases cited by plaintiffs, it appears that, contrary to defendants' statements, the aims of both the Truth-in-Lending Act and the 1933 Securities Act are strikingly similar. The express statutory purpose of Truth-in-Lending is to facilitate the informed use of credit, 15 U.S.C. § 1601; while the purpose of the Securities Act is to require "full disclosure by issuers of securities . . . ." *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *See also SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953); *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.,* 312 U.S. 38, 40 (1941); *People's Securities Co. v. SEC,* 289 F.2d 268, 270-71 (5th Cir. 1961). Moreover, it is clear that, like Truth-in-Lending, fault is not a necessary element to liability under the Securities Act. In *Lewis v. Walston & Co., Inc.,* 487 F.2d 617 (5th Cir. 1973), for example, the Court of Appeals for the Fifth Circuit stated, "Liability for the sale of unregistered securities is absolute under § 12(1) of the Securities Act of 1933. A purchaser may recover regardless of whether he can show any degree of fault, negligent or intentional, on the seller's part." *Id.* at 621. Hence, the distinctions defendants make between the policies and purposes of the two Acts are nonexistent. On the contrary, because of the similarity in the aims of the two Acts, courts in some Truth-in-Lending cases have



cited Securities Act cases as authority for the "similar remedial purposes of the two acts." *E.g., Gardner & North R & S Corp. v. Board of Governors of Federal Reserve System,* 464 F.2d 838, 841 (D.C. Cir. 1972), *citing Tcherepnin v. Knight, supra.*

More importantly, the reasons for using such a standard are the same in both a securities law and Truth-in-Lending context. As observed by the Court of Appeals for the Fifth Circuit in *Hill York Corp. v. American Int'l Franchises, Inc.,* 448 F.2d 680 (5th Cir. 1971), a proximate cause test "lies between the antiquated 'strict privity' concept and the overbroad 'participation' concept which would hold all those liable who participated in the events leading up to the transaction." *Id.* 692. In the area of securities law, this standard constitutes "a rational and workable standard for imposition of liability . . . ." *Id.* Thus, under this test, defendants should be regarded as credit sellers if they were the proximate cause of the sales attacked by the plaintiffs.[6]

Having determined the standard to be applied for determining whether defendants are sellers, it is necessary to consider whether there is any material question of fact as to defendants' participation in the sale of the insurance and whether such participation was a substantial factor in bringing about the sales to these plaintiffs. In essence, defendants argue that resolution of this issue requires a factfinding procedure and cannot be decided on a motion for summary judgment. Plaintiffs, however, contend that no genuine issue of fact remains to be considered at trial.

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[6] Defendants contend that under this standard any institution loaning money for a specific purpose regardless of how distinct it is from the seller could be found to be the proximate cause of the sale and, therefore, could be required to make credit sale disclosures. However, such an unreasonable extension of liability would not occur under the proximate cause test since it limits liability by excluding from coverage by the Act all parties who were not the direct and proximate cause of the sale in question.

The Court agrees with the defendants that the movant must demonstrate that there is no genuine issue of fact and that any doubt as to the existence of a genuine issue of fact is to be resolved against the movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-59 (1970); *Pitts v. Shell Oil Co.*, 463 F.2d 331, 335 (5th Cir. 1972). But this does not mean that under no circumstances could a summary judgment in favor of the plaintiffs be granted in this case. Rather, it is incumbent upon the Court to weigh the evidence presented by the parties to determine whether, when viewed most favorably toward the defendants, it could support a verdict in their favor.

A complete understanding of the role played by the defendants in the sale of cancer insurance requires some discussion of the conglomerate structure of which the defendants were a part at the time of the sale. According to the deposition of Mr. William W. Murphy, Jr., who is the President of the defendants, the latter are wholly-owned subsidiaries of Aristar, Inc., of which Mr. Murphy is vice-president and chief operating officer for the financial division. Mr. Murphy is also a vice-president, director, and employee of Aristar Management, Inc., another wholly-owned subsidiary of Aristar. Aristar Management is a nonprofit corporation that provides supervisory and management services to the two defendant corporations. In addition to these companies, Aristar, Inc., also wholly owns Diamond State Life Insurance Company, which worked out the arrangements with American Family Life Assurance Company regarding the cancer insurance sales program.

The defendants' involvement with American Family began in the early fall of 1972 when Mr. Murphy met with Mr. William Russell, a general agent for American Family, who persuaded him to permit defendants' employees to sell the policies to loan applicants. Mr. Murphy subsequently referred Mr. Russell to Mr. W. J. Seifert, a shareholder in Aristar, Inc., and President of Diamond State Life Insurance Company, for the purpose of working-out a sales program. The program arranged by Diamond State and American Family was essentially that Diamond State would supervise the licensing and payment of defendants' loan managers and supervisors and insure that state regulations regarding the sale of insurance were complied with. American Family Life in turn would distribute $30 of the premium for each policy to Diamond State, and Diamond State would distribute $10 payments to the loan managers for their services as insurance agents, and $5 to defendants' district supervisors, retaining the remainder of the premium for itself. Mr. Murphy established procedures for defendants' employees to follow in handling the insurance, and apparently possessed the authority to terminate the program at any time. Mr. Murphy gave final approval to American Family to hold meetings with the loan companies' employees who wished to act as insurance agents for American Family, and American Family held a seminar for defendants' loan managers on ways of selling cancer insurance. As he stated in his deposition, Mr. Murphy recognized two benefits to be gained by the defendants by having their employees handle the cancer insurance. First, it would enable the defendants to offer to their loan customers an additional service and therefore, distinguish defendants from their competitors. Secondly, it would enable the defendants' employees to enhance their salaries with commissions and similarly provide additional income to the loan managers' supervisors. A benefit not directly running to the defendants but enriching defendants' parent corporation, Aristar, Inc., was the retention of a significant portion of the premium payment by Diamond State, a wholly-owned subsidiary, like defendants, of Aristar, Inc. See Exhibit E, Memo of July 13, 1972, from Mr. DeMarco to Mr. Emmons; and Exhibit C, Memo of July 21, 1972, from Mr. Murphy to Mr. Seifert.

While these facts present a compelling case in support of plaintiffs' position, this Court is of the opinion that the question of "proximate cause" is one that is particularly dependent on a factual determination of defendants' participation in the sale of the insurance and should not be resolved on a summary judgment motion. Although plaintiffs have demonstrated substantial involvement on the part of defendants in the sale of the cancer insurance, defendants maintain that they were only peripheral participants in these sales and that American Family Life was primarily responsible for the way in which the cancer insurance program was conducted. Certainly, the evidence reveals that American Family did take charge of a number of significant aspects of the program, such as the training of defendants' loan managers, in which defendants had little involvement. Whether the defendants' activities were in fact insignificant in comparison to the activities of these other participants, or whether, as plaintiffs contend, defendants should be regarded as sellers of the insurance because they were the proximate cause of the sales must be determined by this Court after a trial at which these issues are fully developed.

Nevertheless, plaintiffs contend that liability in this case could also rest on a determination that the actions of defendants' loan managers are attributable to defendants because they were within the scope of the managers' employment with defendants. However, this issue, like the issue of whether the defendants were a proximate cause of the insurance sales, depends entirely upon an evaluation of all relevant facts in the case. Thus, although plaintiffs have again presented a strong case to support their position, resolution of this issue should await trial. If defendants can establish that the sale of the insurance by their loan managers was completely independent from their work as defendants' employees, they will prevail on the question of agency. On the other hand, if plaintiffs show such activity was authorized and encouraged by



defendants, agency will be established and defendants will be responsible for failure to make required disclosures.

For these reasons, this Court is of the opinion that summary judgment is inappropriate in this case. This conclusion leaves only one issue which still must be considered at this time. Defendants contend that plaintiffs have failed to prove the nonexistence of facts upon which a possible good faith defense under 15 U.S.C. § 1640(c) might rest. 15 U.S.C. § 1640(c) provides that a creditor is not liable under the Truth-in-Lending Act for failure to disclose required information "if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." In response to defendants' assertion that this provision may be applicable, plaintiffs contend that the undisputed facts show that as a matter of law defendants' conduct is outside the scope of section 1640(c).

Although defendants are correct in pointing out that the burden is on the moving party to prove that there is no genuine issue as to any material fact, it is nevertheless also true that a responding party may not rest upon the mere allegations or denials of his pleadings, but rather must demonstrate that there is a genuine issue for trial. Rule 56(e), Fed. R. Civ. P. The only question remaining for this Court to consider is whether defendants' mistake in failing to give credit sale disclosures is the type of mistake for which 15 U.S.C. § 1640(c) provides a "good faith" defense. If the defendants' error could fall within the scope of section 1640(c), plaintiffs would not be entitled to summary judgment in their favor since they have not produced evidence relating to defendants' intent or good faith.

With the exception of a 1972 case from the Northern District of Georgia, *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531, 540-45 (N.D. Ga. 1972), cases involving section

1640(c) unanimously hold that it is available to a defendant only when he has made a clerical error as opposed to an error of law. *Haynes v. Logan Furniture Mart, Inc.*, 4 CCH Consumer Credit Guide ¶ 98,727 (7th Cir. 1974); *Starks v. Orleans Motors, Inc.*, 372 F. Supp. 928, 931, (E.D. La. 1974); *Palmer v. Wilson*, 359 F. Supp. 1099, 1102-03 (N.D. Calif. 1973); *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247-48 (N.D. Ga. 1971); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 281-82 (S.D. N.Y. 1971); *Owens v. Modern Loan Company*, CCH Consumer Credit Guide ¶ 99,099 (W.D. Ky. 1972) (transfer binder). Generally, the rationale for these decisions limiting the scope of section 1640(c) has been that if consumers were forced to prove that creditors intentionally violated the Truth-in-Lending Act, it would make the enforcement of the Act extremely difficult. *E.g., Buford v. American Finance Co.*, 333 F. Supp. 1243, 1248 (N.D. Ga. 1971). Moreover, at least one court has observed that mistakes as to the legality of an individual's actions do not render those actions unintentional, and that in the area of criminal law, errors of law are almost never defenses to a defendant's liability. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 281 (S.D. N.Y. 1971). And two courts—the Seventh Circuit in *Haynes v. Logan Furniture Mart, Inc.*, 4 CCH Consumer Credit Guide ¶ 98,727, and the Court for the Southern District of New York in *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 281—focusing on the legislative history of section 1640(c), have concluded that it proves this section was designed only to absolve clerical errors. 4 CCH Consumer Credit Guide ¶ 98,727 at p. 88, 329; 329 F. Supp. at 281-82.

After reviewing the opinions in these cases, this Court is convinced that 15 U.S.C. § 1640(c) was not intended to cover the type of error defendants made in the present case. By their own admission, defendants' only mistake was in failing to realize that they were credit sellers within the meaning of the Truth-in-Lending Act. Therefore, since



this was an error of law and not simply a clerical error, section 1640(c) is wholly inapplicable to defendants' conduct.

For the reasons stated in this Order, defendants' motion to dismiss is denied, and both parties' motions for summary judgment are denied.

So Ordered, this 28th day of February, 1975.

/s/ ANTHONY A. ALAIMO
United States District Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Civil Action No. 1863

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs*

VS.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant*

Civil Action No. 1864

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs*

VS.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant*

## MEMORANDUM OPINION

(Filed February 4, 1976)

This consolidated class action involves the sale of "cancer insurance" by two loan companies allegedly in violation of the disclosure requirements for credit sales under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* Jurisdiction is based upon section 130(e) of the Act, 15 U.S.C. § 1640(e), and upon 28 U.S.C. § 1337. By stipulation of the parties,[1] the case has been submitted to the Court for decision as though it had been tried to the Court without a jury. This memorandum opinion is that decision. Separate findings of fact and conclusions of law, of even date

[1] *See* Stipulation for Trial (November 21, 1975).

herewith, have been entered pursuant to Rule 52(a), Fed. R. Civ. P.

The defendants, Community Loan Corporation of Richmond County and Community Loan & Investment Corporation of Augusta, though separately incorporated, have identical officers and boards of directors, and both are wholly-owned subsidiaries of Aristar, Inc., the parent corporation of a financial conglomerate which operates some 435 loan offices in 26 states, as well as a chain of retail furniture stores and an insurance company named Diamond State Life Insurance Company.

The defendants are in the business of making loans under the Georgia Industrial Loan Act, *Ga. Code Ann.* § 25-301 *et seq.*

In mid-1972, high-level officials of the Aristar family of corporations were introduced to the idea of offering cancer insurance for sale in their loan offices. The cancer insurance was to be issued by American Family Life Assurance Company of Columbus, and was to be offered in addition to the credit life, accident and health, and property insurance customarily written in connection with loan transactions.

These officials recognized that their "captive market" of small-loan customers consisted of people who could likely be sold this kind of policy. The plan was to offer the cancer insurance for sale to customers when they came in to obtain or refinance loans. The annual premium was $40.00 on an individual policy and $60.00 on a family policy, which would be advanced by the loan company unless the customer wished to pay cash for the policy. For each cancer policy sold in the loan office, fifty percent of the premium would be returned in the form of a sales commission to Diamond State Agency, another wholly-owned subsidiary of Aristar, Inc. Of this $20 to $30, $10 to $12 would be disbursed to the loan manager who sold the policy, and $2 to $5 would be disbursed to his district supervisor.



Diamond State also received a $2 application fee and a $2.40 credit toward purchase of American Family stock for each policy sold. The attractions of the "CancerCare Policy" for the top management of Aristar and defendants were many. It was seen as a way to gain a competitive edge over other loan companies, develop new business, increase revenue, and provide a bonus or incentive plan for employees. A gross from cancer insurance sales of over $1,500,000 a year was envisioned if cancer policies could be sold to just 10% of the 500,000 loan customers doing business with Aristar loan companies.

Some Aristar officials had qualms about the cancer insurance because of its very limited benefits and the customer dissatisfaction which they had been advised would probably result. Nevertheless, Mr. William W. Murphy, the head of the Aristar consumer finance division and the president of both defendant loan companies, was insistent on selling the insurance. Aristar and defendants decided to implement the cancer insurance sales program on an experimental basis in the states of Georgia and South Carolina. Apparently because of licensing difficulties, cancer insurance was actually offered for sale only in the Georgia loan offices, beginning in January, 1973.

Though the volume of cancer insurance sales to Georgia loan customers was very satisfactory, the program was temporarily halted by Mr. Murphy in April, 1973, apparently because of the sales techniques being used by some overly-zealous loan managers, who were simply adding the price of the cancer policy to the loan without the customer's knowledge or consent. The cancer insurance sales program was reinstated in the Georgia loan offices in July, 1973, and continued until about the first of 1974, when it was finally terminated.

The named plaintiffs herein applied for consumer loans at defendants' offices in February and March, 1973, before the temporary halt in the sales program. While handling plaintiffs' loan applications, defendants' loan managers sold

plaintiffs a policy of cancer insurance. Each plaintiff signed a loan contract [2] and a separate application for cancer insurance.[3] Defendants' agents advanced the entire first year's premium from the loan proceeds, indicated as disbursements on each loan contract. Defendants then issued checks payable to American Family and the loan customer.[4] The applications and checks were sent to American Family for formal approval and issuance. All of the plaintiffs used loan proceeds to pay for the policies; no application was rejected by American Family. This pattern applied to all class members.

The instant complaints were filed in December, 1973, and consolidated for trial. A class was certified, consisting of defendants' loan customers in the year preceding these cases' filing, who were sold cancer insurance during loan transactions. Extensive discovery and pretrial narrowing of legal issues has been had. Cross-motions for summary judgment and a motion to dismiss were denied in an Order entered February 28, 1975. Although essentially resolving the questions of law in favor of the plaintiffs, this Court held that outstanding potential factual issues militated against a summary resolution of the cases. After further discovery, the parties stipulated that the case be decided on the basis of the documentary evidence, as if a bench trial had occurred.[5]

On the legal issues, this Court has previously concluded that:

(1) The McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, is no bar to this action. *See* Order, *supra* at 3-7.

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[2] Copies of the loan contracts may be found in the Appendix, as Exhibits "A", "B", and "C" thereto.

[3] Copies of this form in blank, as executed by plaintiffs Singleton and Cody, may be found in the Appendix, as Exhibits "D" and "E".

[4] In the case of Mr. Cody, who is illiterate, the check was simply made payable to American Family.

[5] *See* note 1, *supra*.



(2) The *bona fide* error defense of 15 U.S.C. § 1640(c) is not available on these facts. *See, e.g., Buford v. American Finance Company,* 333 F. Supp. 1243 (N.D. Ga. 1971); Order, *supra* at 18-21.

(3) Of the three elements in 15 U.S.C. § 1602(g) necessary to create a "credit sale" under Truth-in-Lending, two are met here. (a) There was a "sale." *See Stefanski v. Mainway Budget Plan, Inc.,* 456 F.2d 211 (5th Cir. 1972). State law definitions are inapplicable, and an insurance agent's taking of an application for insurance is a "sale." *See* Order, *supra* at 7-9. (b) Defendants admitted extending consumer credit. *See* Order, *supra* at 8. (c) The only remaining issue is whether defendants are sellers. *See id.*

(4) The proximate cause/substantial factor text applied in securities cases such as *Lewis v. Walston & Company,* 487 F.2d 617, 621-22 (5th Cir. 1973) and *Hill York Corp. v. American International Franchises, Inc.,* 448 F.2d 680, 692-93 (5th Cir. 1971) is applicable in Truth-in-Lending cases. Thus, defendants are credit sellers if they were the proximate cause of the sales. *See* Order, *supra* at 11-13.

(5) Alternatively, defendants may be liable as principals for the actions of their agents, if the sales of cancer insurance were within the scope of the loan managers' employment. *See* Order, *supra* at 817-18.

Several facts are relevant to the proximate cause test. Defendants, by their president, Mr. Murphy, authorized the licensing of defendants' loan managers so they could sell cancer insurance to loan customers. An arrangement was worked out with American Family by which the loan officers and their supervisors would receive sales commissions from American Family through Diamond State, which retained about one-fourth of each premium to the ultimate benefit of Aristar, Inc., defendants' parent. The management of defendants and Aristar hoped for large profits if the insurance could be sold throughout the "captive market" of all of Aristar's loan offices in the South-

east. Mr. Murphy established policies for the sales program, and once halted it temporarily because of non-compliance with his guidelines. Thus, defendants initiated the scheme, planned it, controlled it and benefitted from it. It is clear that defendants were not only a substantial factor, but indeed were "the motivating force behind this whole project." *Hill York, supra* at 693. Defendants are, therefore, liable under the proximate cause test.

Alternatively, defendants are liable under agency principles, since the actions of the loan managers were clearly authorized and encouraged by defendants. As already shown, the sales program was a carefully planned project of defendants' management. Defendants expressly authorized every phase of the insurance sales: the licensing of their loan managers to sell insurance; the solicitation of applications for insurance from loan customers, at defendants' offices, while the loan managers were performing their normal duties; the offering of financing for the premiums. Defendants' president "ran" the sales program by establishing guidelines, and temporarily discontinuing the program when these guidelines were violated. Mr. Murphy supported sales commissions for the loan managers, and authorized them to attend sales seminars held by American Family. The loan managers were "sellers" of the cancer insurance. *See* Order, *supra* at 9. These sales were expressly authorized by defendants, who made them possible. The loan managers were acting within the scope of their employment, and defendants are liable as principals. *See Restatement (Second) of Agency* § *229* (1957).

Defendants' only argument not previously considered is that American Family, as an arranger of credit, was the only entity with a duty to make credit sale disclosures. This contention utterly lacks merit. There has been no showing that American Family was an arranger of credit. It is clear that defendants both sold the policies and extended credit on the sales. Defendants' citation of ***Manning v. Princeton Consumer Discount Co.,*** 390 F. Supp.



320 (E.D. Pa. 1975), *reconsidered,* Civil No. 74-875 (E.D. Pa., May 30, 1975) is inapposite, since there the lender and seller were separate entities. In *Manning,* an auto dealer made a sale, then arranged for financing with a lender (for a referral fee). Despite contrary case law, the court held that only the auto dealer had to make credit sale disclosures. Here, the lender was also effectively the seller. It would be absurd to suggest that responsibility for making credit sale disclosures should be placed exclusively upon American Family, merely because its approval was necessary for the formal completion of the sale. Regulation Z, 12 C.F.R. § 226.6(d), concerning multiple creditors, is likewise inapposite. There is no showing that American Family was a creditor. The attempt to shift exclusive responsibility to American Family is unavailing. Whatever American Family's duties may have been, these defendants were credit sellers and failed to make appropriate credit sale disclosures. *Manning* is distinguishable, and is neither persuasive nor controlling.

Defendants contend that the result reached here will place lenders in an untenable position by forcing them to make an impossible choice between "loan" and "credit sale" disclosures. The answer is obvious; if both types of disclosure apply, both should be given.[6] Moreover, this decision does not support absolute liability for every lender who makes loan disclosures but not credit sale disclosures. Common transactions such as automobile loans would only be analogous to the instant fact situation if the bank's loan officer were also a car salesman receiving commissions from the car dealer for sales made in the scope of his employ-

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[6] In doubtful cases, a lender runs no risk by making disclosures which turn out to be unnecessary because the contemplated credit purchase using loan proceeds is never consummated. Both the statute and the regulation provide that information disclosed, which later becomes inaccurate because of later events, does not violate the statute. *See* 15 U.S.C. § 1634; Regulation Z, 12 C.F.R. § 226.6(g).

ment, or sales proximately caused by the bank. This case presents a situation which lies at the heart of the policies behind Truth-in-Lending. The disclosures made by defendants on their "Note—Security Agreement" form revealed nothing about the cancer insurance beyond a deduction of "Check payable to American Family Life Assurance Corp." from the "Net to customer" figure. The separate "Request for Cancercare Plan" reveals only the premium amount. By failing to make credit sale disclosures, defendants were able to extract painlessly an extra profit from loan customers, who in many cases simply signed or made their mark as instructed, and took home the proceeds, less deductions for various items including the cancer insurance premium. Truth-in-Lending was designed to require disclosure of the terms of credit sales, to insure that lenders would make borrowers aware of what they were agreeing to. *See* 15 U.S.C. § 1601.

Therefore, defendants' failure to make credit sale disclosures required by 15 U.S.C. § 1638 renders them liable under 15 U.S.C. § 1640(a). Each plaintiff, and each member of the class, is entitled to the $100 minimum statutory penalty,[7] since each is a "customer" to whom disclosures should have been made. *See* Regulation Z, 12 C.F.R. § 226.2 (o). Judgment shall be entered for the plaintiffs.

So Ordered, this 4th day of February, 1976.

/s/ ANTHONY A. ALAIMO
United States District Judge

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[7] By stipulation, the 1974 amendments to this section, Pub. L. No. 93-495, Title IV, § 408(a) (Oct. 28, 1974), 88 Stat. 1518, are not applicable to this action. *See* Addendum to Pretrial Order (March 5, 1975).



[EXHIBITS A, B and C to the District Court's Memorandum Opinion are copies of lengthy loan contracts. These documents are not reproduced in this Appendix but are in the record in this case and will be available to this Court.

Pertinent Truth-in-Lending disclosures in these contracts appear in the majority opinion in this case. (See p. 45a, *infra.*)

EXHIBIT D to the District Court's Memorandum Opinion is a copy of a blank application for insurance. This document is not reproduced in this Appendix but is in the record in this case and will be available to this Court.

EXHIBIT E to the District Court's Memorandum Opinion contains completed applications for insurance and a policy payment schedule. This document is not reproduced in this Appendix but is in the record in this case and will be available to this Court.]

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Civil Action No. 1863

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs*

vs.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant*

Civil Action No. 1864

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs*

vs.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant*

### FINDINGS AND CONCLUSIONS AND FINAL JUDGMENT

(Filed February 5, 1976)

This is a class action concerning alleged violations of the disclosure requirements for credit sales under the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* By stipulation of the parties,[1] the case has been submitted to the Court for decision as though it had been tried to the Court sitting without a jury. A separate memorandum opinion has been filed, of even date herewith. The following are the Court's findings and conclusions pursuant to Rule 52(a), Fed. R. Civ. P.

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[1] *See* Stipulation for Trial (November 21, 1975).

**Findings of Fact**

1. Defendants are corporations engaged in the business of lending money in Richmond County, Georgia, and in the ordinary course of business, defendants regularly extend or offer to extend credit for which a finance charge is or may be imposed.

2. The plaintiffs were customers of defendants, and members of that class of persons who, during the year preceding the filing of these actions, entered into consumer credit transactions with one of the defendants and, as part of such transactions, were sold policies of cancer insurance.

3. The defendants extended consumer credit to each plaintiff with respect to sales of cancer insurance to such plaintiff.

4. In these transactions, the defendants made all their Truth-in-Lending disclosures in a "Note—Security Agreement." An example of this document may be found in the Appendix. The only mention of the cancer insurance sale was a deduction for a "Check payable to American Family Life Assurance Corp." from the "Net to customer" figure. The separate "Request for Cancercare Plan," an example of which may also be found in the Appendix, reveals only the premium amount. Thus, loan disclosures required by 15 U.S.C. § 1639 and 12 C.F.R. § 226.8(d) were made. However, disclosures concerning the extension of credit toward the purchase of cancer insurance, required by 15 U.S.C. § 1638 and 12 C.F.R. § 226.8(c), were not made.

5. The defendants planned, authorized, controlled, and benefitted from the sales of cancer insurance by their loan managers, as shown by the following facts:

a. The defendants authorized the American Family Life Assurance Company (American Family) to license, as insurance agents, certain of defendants' employees so that such persons, in defendants' words, could "sell insurance."



b. The defendants, through their president, William W. Murphy, Jr., authorized their office managers, as licensed insurance agents, to take applications for cancer insurance policies from the defendants' loan customers, at the defendants' offices, during regular business hours, and where the customer did not have the cash to pay the premium, to offer to advance to such customers cash from the loan to pay the premium.

c. W. W. Murphy, at all relevant times hereto, was the president of defendant corporations, a director and officer of defendants' management service, and chief operating officer of the financial division of defendants' parent corporation.

d. Mr. Murphy recognized two benefits to be gained by the defendants by having their employees handle the cancer insurance. First, it would enable the defendants to offer to their loan customers an additional service and distinguish defendants from their competitors. Second, it would provide additional income to defendants' loan managers and their supervisors. Further, the defendants and their parent expected to make substantial profits even though they were aware of the questionable benefits the cancer policies would provide.

e. Mr. Murphy was the dominant force in all major decisions regarding the sales of cancer insurance through defendants' loan offices, as shown by the following facts:

(1) Murphy participated in initial discussions with representatives of American Family.

(2) He touted the sales program to his fellow corporate officers and was insistent on experimenting with it in defendants' Georgia loan offices.

(3) Mr. Murphy decided to begin the sales of cancer insurance through defendants' loan offices.

(4) He established policies and procedures that he expected to be followed by defendants' agents in handling the cancer insurance, and he issued oral instructions concerning these policies and procedures to the regional supervisor of the defendants' management service corporation.

(5) Mr. Murphy approved the method by which the commissions on the insurance sales were initially distributed.

(6) He approved of the loan managers being compensated for their insurance sales by American Family.

(7) The loan managers received a commission of about $10-12 for each policy they sold; their supervisors received about $2-5 per policy.

(8) Diamond State Agency, a wholly-owned co-subsidiary of Aristar, Inc., the defendants' parent corporation served as the general and receiving agent for the commissions and retained a commission of approximately $20 to $30 per policy plus an application fee of about $2 and a credit of $2.40 toward the purchase of American Family stock.

(9) Mr. Murphy directed that seminars be held for the loan managers on the sale of the cancer policies. Such seminars were held.

(10) Mr. Murphy terminated the cancer insurance sales in April or May of 1973 and later permitted the program to be re-established.

f. Policies and procedures for the cancer insurance transactions were established by officers and agents of the defendants.

g. The persons who sold the cancer insurance to the plaintiffs were the managing agents or loan managers of defendants' local loan offices.



h. The sales of cancer insurance by the loan managers were authorized and encouraged by the defendants.

6. The sales of cancer insurance were within the scope of the loan managers' employment with defendants, as shown by the following facts:

a. All of the findings stated in paragraph five, *supra,* are expressly incorporated herein.

b. Defendants expressly and impliedly authorized every significant phase of the cancer insurance sales, *see* findings 5(a) and (b), *supra*; defendants, through their president, controlled the sales program. *See* findings 5(e)(1)-(6), (9)-(10): 5(f), *supra.*

**Conclusions of Law**

1. This Court has jurisdiction over the subject-matter pursuant to 15 U.S.C. § 1640(e) and 28 U.S.C. § 1337.

2. The Southern District of Georgia is a place of proper venue for these actions. 28 U.S.C. § 1391(b).

3. Plaintiffs are "customers" as defined by 12 C.F.R. § 226.2(o) and defendants are "creditors" as defined by 12 C.F.R. § 226.2(m).

4. The solicitation of applications for cancer insurance was a "sale" within the meaning of Truth-in-Lending. Order of February 28, 1975 at 7-8. *See Stefanski v. Mainway Budget Plan, Inc.,* 456 F.2d 211 (5th Cir. 1972).

5. The defendants extended consumer credit to the plaintiffs within the meaning of Truth-in-Lending. Order of February 28, 1975 at 2, 7-8. *See* 15 U.S.C. § 1602(e), (f), (h); Regulation Z, 12 C.F.R. § 226.2(k), (l), (m), (o).

6. The defendants were sellers of cancer insurance with respect to which they extended consumer credit, and thus they were credit sellers within the ambit of the Truth-in-Lending Act. *See* 15 U.S.C. § 1602(g); Regulation Z, 12

C.F.R. § 226.2(n); F.R.B. Letter of January 5, 1970, No. 225 [transfer binder], CCH Consumer Credit Guide ¶ 30,257.

(a) State law is not determinative of who is a credit seller under Truth-in-Lending, and this term must be given an interpretation consistent with the purpose of the statute. Order of February 28, 1975 at 9-11. *See Mourning v. Family Publication Service, Inc.,* 411 U.S. 356, 377 (1973); *Thomas v. Myers-Dickson Furniture Co.,* 479 F.2d 740, 748 (5th Cir. 1973); *Stefanski v. Mainway Budget Plan, Inc., supra* at 212.

(b) A "seller" within the Truth-in-Lending definition of a "credit sale" is one whose acts are a substantial factor in or a proximate cause of the sale. Order of February 28, 1975 at 11-13. This conclusion is based on the use of such a test in cases involving the federal securities acts, which have purposes similar to those in the Truth-in-Lending Act. *See Lewis v. Walston & Co.,* 487 F.2d 617, 621-22 (5th Cir. 1973); *Hill York Corp. v. American International Franchises, Inc.,* 448 F.2d 680, 692-93 (5th Cir. 1971). *See also Lennerth v. Mendenhall,* 234 F. Supp. 59, 65 (N.D. Ohio 1964).

(c) Defendants, acting through their management, initiated the insurance sales scheme, planned it, controlled it, and benefitted from it. Defendants were a substantial factor in or the proximate cause of the sales, and indeed, were "the motivating force behind this whole project." *Hill York, supra* at 693. *See also Lewis v. Walston & Co., supra* at 693. *SSupra*; F.R.B. Letter, *supra.*

7. Alternatively, the defendants are responsible as principals for the actions of their agents, the loan managers, since the sales of cancer insurance were within the scope of those agents' employment. The facts show that defendants expressly or impliedly authorized and encouraged every significant phase of the insurance sales.



Thus, under agency principles, defendants are liable. *See Lewis v. Walston & Co., supra* at 622-23; *Restatement (Second) of Agency* § 229 (1957).

8. The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.,* is not a bar to these actions. Order of February 28, 1975, at 3-7. *See* 15 U.S.C. §§ 1011, 1012; 15 U.S.C. § 1610(a); Regulation Z, 12 C.F.R. § 226.6(c); *Atlantic & Pacific Insurance Co. v. Combined Insurance Co.,* 312 F.2d 513, 515 (10th Cir. 1962); *Sears, Roebuck & Co. v. All States Life Insurance Co.,* 246 F.2d 161, 172 (5th Cir. 1957), *cert. denied,* 355 U.S. 894 (1957); *Zachman v. Erwin,* 186 F. Supp. 691, 694 (S.D. Tex. 1960); Ga. Code Ann. §§ 84-5302-09.

9. The bona fide error defense of 15 U.S.C. § 1640(c) applies to clerical errors, not to errors of law. Therefore, this defense is not available on the facts of this case. Order of February 28, 1975 at 19-21. *See Haynes v. Logan Furniture Mart, Inc.,* 4 CCH Consumer Credit Guide ¶ 98,727 (7th Cir. 1974); *Starks v. Orleans Motors, Inc.,* 372 F. Supp. 928, 931, (E.D. La. 1974), *aff'd mem.,* 500 F.2d 1182 (5th Cir. 1974); *Palmer v. Wilson,* 359 F. Supp. 1099, 1102-03 (N.D. Calif. 1973); *Owens v. Modern Loan Company,* CCH Consumer Credit Guide ¶ 99,099 (W.D. Ky. 1972); [transfer binder] *Buford v. v. American Finance Co.,* 333 F. Supp. 1243, 1247-48 (N.D. Ga. 1971); *Ratner v. Chemical Bank New York Trust Co.,* 329 F. Supp. 270, 281-82 (S.D. N.Y. 1971).

10. The defendants violated Truth-in-Lending by failing to provide plaintiffs with the required credit sale disclosures. *See* 15 U.S.C. §§ 1631(a), 1638; Regulation Z, 12 C.F.R. §§ 226.6(a), 226.8(a), (b), (c), (e). The specific violations were as follows:

(a) Failure to disclose the cash price of the cancer insurance policy using the term "cash price," as required by 15 U.S.C. § 1638(a)(1) and Regulation Z, 12 C.F.R.

§ 226.8(c)(1). *See Joseph v. Norman's Health Club, Inc.*, 386 F. Supp. 780, 789 (E.D. Mo. 1974).

(b) Failure to disclose the total amount to be financed in the credit sales of insurance, using the term "amount financed," as required by 15 U.S.C. § 1638(a)(5) and Regulation Z, 12 C.F.R. § 226.8(c)(7). This term depends on the cash price. Since the cash price was not accurately disclosed, it follows that the amount financed on the sale of cancer insurance was not accurately disclosed. *See Joseph v. Norman's Health Club, Inc., supra* at 789.

(c) Failure to disclose the finance charge attributable to this credit sale, using the term "finance charge" as required by 15 U.S.C. § 1638(a)(6) and Regulation Z, 12 C.F.R. § 226.8(c)(8)(i). *See Joseph v. Norman's Health Club Inc., supra* at 789.

(d) Failure to disclose the finance charge on the credit sale as an annual percentage rate, using the language "annual percentage rate" as required by 15 U.S.C. § 1638 (a)(7) and Regulation Z, 12 C.F.R. § 226.8(b)(2). *See Joseph v. Norman's Health Club, Inc., supra* at 789-90.

11. The defendants are liable for such violations. 15 U.S.C. § 1640(a).

12. Each plaintiff is entitled to recovery of the statutory penalties prescribed by 15 U.S.C. § 1640(a), since each is a "customer" within the meaning of Truth-in-Lending and a person with respect to whom defendants have failed to comply with the disclosure requirements of that statute. 15 U.S.C. § 1640(a); Regulation Z, 12 C.F.R. § 226.2(o).

So Ordered, this 5th day of February, 1976.

/s/ ANTHONY A. ALAIMO
United States District Judge



[The Appendix to the District Court's Findings and Conclusions contains a copy of a portion of the Touchstone loan contract, the Singleton insurance application, and the Singleton insurance policy payment schedule. These documents are not reproduced in this Appendix but are in the record in this case and will be available to this Court.]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Civil Action No. 1863

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs*

VS.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant*

Civil Action No. 1864

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs*

VS.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant*

**FINAL JUDGMENT**

Upon the Order of this Court entered on February 4th, 1976 determining that plaintiffs are entitled to recover of the defendant, judgment is hereby entered in favor of the plaintiffs and

IT IS ADJUDGED, that plaintiffs recover $100.00 minimum statutory penalty and their costs of court expended in their behalf. Cost to be taxed by the Clerk of this Court.

This 6th day of February, 1976

LOUIS E. AENCHBACHER, Clerk
By /s/ T. A. BRODERICK
Deputy Clerk.



**APPENDIX D**

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Jan. 2, 1979

No. 76-1687

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs-Appellees,*

v.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant-Appellant.*

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs-Appellees,*

v.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant-Appellant.*

**Appeal from the United States District Court for the Southern District of Georgia**

• • • • • • • • • • •

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

These consolidated cases come before us in a different posture than the other cases[1] we have decided today involving the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. §§ 1011 *et seq.*, and the Truth in Lending Act ("TIL"), 15 U.S.C. §§ 1601 *et seq.* Here the district court rejected the McCarran Act defense, reached the merits of the TIL claims, and entered judgment for plaintiffs. We affirm.

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[1] *Cochran v. Paco, Inc.*, 606 F.2d 460 (5 Cir. 1978); *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5 Cir. 1978).

## I. Factual Background

Community Loan Corporation of Richmond County and Community Loan & Investment Corporation of Augusta (hereinafter "Community") are separately incorporated but share the same officers and board of directors. They are wholly-owned subsidiaries of Aristar, Inc., the parent corporation of a financial conglomerate that operates more than 400 loan offices in 26 states and owns the Diamond State Life Insurance Company and the Diamond State Agency. Community is a lender licensed under the Georgia Industrial Loan Act, Ga.Code Ann. §§ 25-301 *et seq.*

In 1972 Aristar developed a program to offer cancer insurance for sale in the loan offices of its subsidiaries. This insurance was to be issued by American Family Life Assurance Company and was to be offered in addition to the credit life, accident and health, and property insurance customarily written in connection with loan transactions.[2] The annual premium—$40 on an individual policy, $60 on a family policy—was to be paid by Community to American Family out of the proceeds of the loan. Pursuant to a brokerage agreement between American and Diamond State Agency, for each cancer policy sold in the loan office, 50% of the premium would be returned in the form of a sales commission to Diamond State Agency. Of that amount, $10 or $12 would be disbursed to the loan manager who sold the insurance policy and $2 or $5 to his district supervisor. Diamond State Agency also received a $2 application fee and a $2.40 credit toward the purchase of American Family stock for each cancer policy sold.

[2] Aristar officials recognized that their small loan customers were a potential "captive market," Record at 191, and one memorandum projects an annual gross of more than $1.5 million. *Id.* at 188.



Despite some initial qualms about selling these "Cancer-Care" policies,[3] Aristar and Community decided to implement the sales program on an experimental basis in Georgia and South Carolina. The program was arranged by Diamond State Life Insurance Company and American Family, with Diamond State to oversee the licensing of Community's loan managers and to ensure compliance with state insurance regulations. Community's loan managers eventually became licensed insurance agents of American Family, and the Georgia sales program was instituted in January 1973. The South Carolina program never got off the ground, apparently because of licensing difficulties.

The program was temporarily halted in April 1973, apparently because of the sales techniques of some overzealous loan managers who added the price of the cancer policy to the loan without the borrower's knowledge or consent. Internal correspondence indicates attempts to correct this practice,[4] and the sales program was reinstated in July. However, it was terminated in early 1974.

Plaintiffs Jessie and Sallie Mae Cody, James and Glenda Touchstone, and Inez Singleton were Community customers who applied for loans in February and March 1973. While

[3] Some Aristar officials feared customer dissatisfaction because of the policy's limited benfits. The company was also aware that many states prohibit the sale of cancer insurance.

[4] For example, a Community vice-president wrote certain Georgia supervisors on March 20, 1973, about cancer insurance sales. The letter reads in pertinent part:

> We have been advised by Mr. Beck with American Family Life Assurance Company of Columbus (CANCER CARE) that his company is receiving complaints from our customers.
>
> It seems we are guilty of not selling the policies, but instead are adding them on the loan without the customer's knowledge or consent.
>
> THIS PRACTICE MUST BE STOPPED IMMEDIATELY. We must have the customer's consent, and he must be aware of the cost, benefits, and amount of yearly premiums.

R. at 221.

handling the loan applications, Community's loan managers, acting as agents of American Family, sold the plaintiffs CancerCare policies. Each plaintiff signed a loan contract and a separate application for cancer insurance, although the record strongly suggests that they did not know they were purchasing the cancer insurance. The first year's premium was deducted from the loan proceeds and was indicated as a disbursement to the customer and American Family. Community then issued checks payable to American Family and the customer, and the insurance applications and checks were forwarded to American Family for approval and issuance of the policies.

The plaintiffs brought suit on behalf of themselves and others similarly situated, alleging violations of TIL's credit sale disclosure requirements, 15 U.S.C. § 1638(a); 12 C.F.R. § 226.8(c).[5] They sought the statutory penalty and attorneys' fees allowed under 15 U.S.C. § 1640(a).[6] The district court certified the cases as class actions and, by stipulation of the parties, they were submitted as though they had been tried to the court without a jury. The court ultimately entered judgment for plaintiffs, and Community appealed.

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[5] For example, the Touchstone-Singleton complaint alleged that Community failed to: (1) disclose the cash price of the cancer insurance policy using the term "cash price" as required by 12 C.F.R. § 226.8(c)(1); (2) disclose the amount financed in the credit sale using the term "amount financed" as required by § 226.8(c)(7); (3) disclose the finance charge attributed to the credit sale and label such as "finance charge," as required by § 226.8(c)(8)(i); and (4) disclose the finance charge as an annual percentage rate using the term "annual percentage rate," as required by § 226.8(b)(2). Record at 727.

[6] The complaints did not allege violations of TIL's consumer loan disclosure requirements, 15 U.S.C. § 1639, 12 C.F.R. § 226.8(d). The district court found as a fact that such disclosures were made. On appeal, plaintiffs characterize this finding as dictum; however, they did not cross-appeal and the issue is thus not before us. ***Fain v. Caddo Parish Police Jury,*** 564 F.2d 707, 709 n.3 (5 Cir. 1977).



## II. The McCarran Act

The district court concluded that the McCarran Act exemption[7] was unavailable to Community because Georgia did not regulate disclosures accompanying the sale of insurance, and, even if it did, TIL would not conflict with Georgia law. We agree that the McCarran Act does not bar application of TIL, but for different reasons.

The McCarran Act is explored in depth in *Cochran v. Paco, Inc., ante,* 606 F.2d 460, and we refer the reader to that opinion for essential background. There we held that the lending activities of a premium finance company do not constitute the "business of insurance" and that the McCarran Act does not preclude application of TIL's disclosure requirements. Similarly, in *Perry v. Fidelity Union Life Ins. Co., ante,* 606 F.2d 468, we concluded that premium financing by an insurance company in connection with the sale of an insurance policy is not the "business of insurance" for McCarran Act purposes, and that TIL is thus applicable to such a loan transaction.

The instant case presents a hybrid situation. Plaintiffs contend that Community made a "credit sale" of an insurance policy and thus should have made the disclosures required when a credit sale occurs. *See* footnote 8, *infra.*

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[7] 15 U.S.C. § 1012 provides:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

For purposes of our McCarran Act analysis, we assume that the loan managers, acting in their dual capacities as employees of Community and licensed agents of American Family, made a credit sale of cancer insurance and that Community was a "seller" under TIL.

The sale of an insurance policy is undoubtedly the "business of insurance" for McCarran Act purposes. *Securities & Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). However, *Perry* makes clear that the lending activities of an insurance company are apart from that business: "the financing activity is purely ancillary to the insurance relationship between the insurance company and the policyholder." 606 F.2d at 470. Thus, Community's *selling* of the cancer insurance policies constituted the "business of insurance," although its *financing* of them on a credit sale basis did not.

The mere fact that Community sold the policies that it financed does not preclude application of TIL, since the financing is insufficient to invoke the McCarran Act exemption. Accordingly, any inquiry into the nature of state regulation or the conflict between the state scheme and TIL is unnecessary. *Cochran v. Paco, Inc., supra,* 606 F.2d at 467 n.15. We thus turn to the TIL questions presented by this case.

### III. The Truth in Lending Act

Plaintiffs urged in the district court that the transaction involved not only a loan but also a credit sale of an insurance policy as to which the required disclosures had not been made. Community contended that the transaction was simply a loan, that all consumer loan disclosures had been made in accordance with TIL, and that no credit sale disclosures were required.

The gravamen of plaintiffs' complaint was that Community made disclosures only as to the total amount of the



loan and did not make separate disclosures as to the cost of financing the annual premiums on the cancer policies. The Touchstone transaction is illustrative. At the top of one legal-size page, Community made the following disclosures:

| | |
|---|---|
| Date finance charge begins to accrue | 02-08-73 |
| Schedule of payments | one of $85 and 23 of $85 |
| Total payments | $2040.00 |
| Interest | $ 281.38 |
| Service fee | $ 105.60 |
| FINANCE CHARGE | $ 386.98 |
| Amount financed | $1653.02 |
| Life Insurance premium | $ 76.70 |
| Disability insurance premium | $ 71.40 |
| Property insurance premium | $ 0.00 |
| Official fees | $ 3.50 |
| Net to customer(s) | $1501.42 |
| ANNUAL PERCENTAGE RATE | 21.07% |
| Amount of insurance | |
| Life | $2040.00 |
| Disability ins. benefits | $ 85.00 |
| Term (mos.) | 24 |
| First payment due | 03-15-73 |
| Maturity date | 02-08-75 |
| Amount of note | $2040.00 |

At the bottom of the same page, under the heading "security agreement," the following information appears:

| | |
|---|---|
| Net to customer(s) | $1501.42 |
| Less balance on [former loan] | $ 660.28 |
| Check payable to Interstate Securities | $ 505.30 |
| Check payable to Bankers Trust Co. | $ 190.00 |
| Check payable to American Family Life Assurance Comp. | $ 60.00 |
| Cash received | $ 85.84 |

Record at 685.

The district court held that there was a credit sale within the meaning of TIL and that the required disclosures [8]

[8] 15 U.S.C. § 1602(g) states that "[t]he term 'credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. . . ."

15 U.S.C. § 1638(a) governs credit sales and requires the creditor to "disclose each of the following items which is applicable":

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.



had not been made. The court also rejected Community's "good faith" or "bona fide error" defense [9] and determined

12 C.F.R. § 226.8(c) provides:

Credit Sales. In the case of a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The cash price of the property or service purchased, using the term "cash price."

(2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "trade-in" and the sum, using the term "total downpayment."

(3) The difference between the amounts described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."

(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.

(5) The sum of the amounts determined under subparagraphs (3) and (4) of this paragraph, using the term "unpaid balance."

(6) Any amounts required to be deducted under paragraph (e) of this section using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term "total prepaid finance charge and required deposit balance."

(7) The difference between the amounts determined under subparagraphs (5) and (6) of this paragraph, using the term "amount financed."

(8) Except in the case of a sale of a dwelling:

(i) The total amount of the finance charge, using the term "finance charge," and where the total charge consists of two or more types of charges, a description of the amount of each type, and

(ii) The sum of the amounts determined under subparagraphs (1), (4), and (8)(i) of this paragraph, using the term "deferred payment price."

[9] 15 U.S.C. § 1640(c) provides:

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor

that each plaintiff and each class member were entitled to the $100 statutory penalty since each is a "customer" to whom disclosures should have been made.[10] Thus, Mr. and Mrs. Touchstone, joint obligors on their single loan, each received $100.

*A. Credit Sale*

Under 15 U.S.C. § 1602(g) and 12 C.F.R. § 226.2(t), the term "credit sale" is defined as "any sale with respect to which credit is extended or arranged by the seller." The sale of insurance is clearly a sale within the meaning of TIL. *Stefanski v. Mainway Budget Plan, Inc.*, 456 F.2d 211 (5 Cir. 1972). Moreover, Community admittedly "extended" credit to the purchasers of the cancer insurance policies. The only question, then, is whether Community was a "seller" within the meaning of § 1602(g).

The district court held that Community was a seller under two theories. First, the court concluded that Community was a "proximate cause" of or "substantial factor" in the sale, borrowing those terms from cases involving

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shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

The district court concluded that this section applies only where the lender made a clerical error, not where, as here, there was a mistake of law. *See McGowan v. King, Inc.*, 569 F.2d 845, 849 (5 Cir. 1978). Community does not challenge this holding on appeal.

[10] 12 C.F.R. § 226.2(u) defines "customer" as a cardholder (as defined in § 226.2(m)) or "a natural person to whom consumer credit is offered or to whom it is or will be extended, and includes a comaker, endorser, guarantor, or surety for such natural person who is or may be obligated to repay the extension of consumer credit." Former § 226.2(*o*), in effect when this action was brought, contained the same definition, except for inclusion of the term "cardholder."



Securities Act violations. *See, e.g., Lewis v. Walston & Co.*, 487 F.2d 617, 621-22 (5 Cir. 1973); *Hill York Corp. v. American Int'l Franchises, Inc.*, 448 F.2d 680, 692-93 (5 Cir. 1971). Alternatively, the court determined that Community was a seller under agency principles, since Community authorized and encouraged its loan managers to sell the cancer insurance.

Community argues that, under Georgia law, there is no "sale" of an insurance policy until the application for such a policy is accepted by the insurer. *See, e.g., Sasser v. Coastal States Life Ins. Co.*, 113 Ga.App. 17, 147 S.E.2d 5 (1966). Therefore, Community contends, only American Family could be a "seller" since it had the authority to accept or reject the applications.

We find this argument unpersuasive for several reasons. First, it ignores Community's role in the merchandising process and instead emphasizes the moment at which a contractual agreement actually arose. Since TIL is "consumer protection" legislation, we think the appropriate focus should be on the time of the contact with the consumer. That is, we must examine the transaction through the eyes of the consumer, and the transactions in the instant case, viewed in such a manner, involved a sale of cancer insurance by the loan managers. *Cf. Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-15 (5 Cir. 1976), *cert. denied*, 431 U.S. 929, 97 S.Ct. 2633, 53 L.Ed.2d 245 (1977) (seller who prearranges credit for consumer is creditor under TIL). From the plaintiffs' perspective, Community was obviously selling the insurance policies, for plaintiffs' only contact with any organization concerning the policies was with Community's loan managers during normal office hours. Even if the loan managers were "wearing two hats," the one marked "American Family" was all but invisible to the plaintiffs.[11]

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[11] Interestingly, Community's correspondence characterized the transactions as "sales." For example, Mr. Murphy wrote an

Second, under 12 C.F.R. § 226.8(a), a creditor must make TIL disclosures "before the transaction is consummated." Section 226.2(kk) provides that a "transaction shall be considered consummated at the time a contractual relationship is created . . . ." Thus, although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for TIL purposes. The obligation to disclose arises before the creation of a contractual relationship, and it would be circular to define the nature of the transaction—which determines the particular disclosures that are required—in terms of the state law governing the contract's formation. We thus characterize the transaction as a matter of federal law. *Starks v. Orleans Motors, Inc.*, 372 F. Supp. 928, 931 (E.D.La.) (Rubin, J.), *aff'd*, 500 F.2d 1182 (5 Cir. 1974).[12]

Third, we have stressed that TIL is a remedial statute that is to be liberally construed in favor of the consumer. *Sellers v. Wollman*, 510 F.2d 119, 122 (5 Cir. 1975); *see also McGowan v. King, Inc.*, 569 F.2d 845, 848 (5 Cir. 1978); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5 Cir. 1973). A hyper-technical interpretation of "seller" or "sale" based on state law would be contrary to this principle.

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American Family official that "it is not possible for *us to sell this policy* . . . in all of our operating units in every state." Record at 191 [emphasis added]. In a memo to the president of Diamond State, Murphy explained that if "*we sold this policy* to our customers, we would get an immediate commission. . . ." Record at 189 [emphasis added].

[12] Contrary to Community's assertion, this approach is not violative of 15 U.S.C. § 1610(b), which provides that TIL "does not otherwise annul, alter or affect in any manner . . . the laws of any State . . .." Our analysis of whether Community is a "seller" applies only in the context of TIL and does not alter in any respect Georgia law that determines when a sale occurs.



Finally, we agree with the district court that "applications to the insurance company provided no information upon which the company could chose to reject them, . . . and the final step in the consummation of the sales transaction in question was a mere formality." Record at 534. In terms of the overall consumer transaction, American Family's only function was to rubber stamp the applications and issue the policies.

Having concluded that state law is not dispositive of Community's status, we now examine that issue in terms of the loan company's role in the merchandising of the insurance and its business relationship with American Family. Although we have doubt as to the viability of the district court's "proximate cause" theory in the TIL context, we are convinced that the record is more than sufficient to establish Community's status as a "seller" by virtue of its relationship with American Family and by application of simple agency principles.

Aristar, Community's corporate parent, clearly developed the cancer insurance sales program as a profitable sideline that would help develop new loan business, increase revenue to the tune of a projected annual gross of $1.5 million, and provide a bonus or incentive plan for Community's loan managers and supervisory personnel. American Family's role was to underwrite the CancerCare policies sold by Community's loan managers, who were also licensed agents of American Family.

We thus view the program as a type of joint venture between American Family and the Aristar family, with American Family providing the policy and Community the marketing. Aristar undoubtedly benefited from the arrangement, for Diamond State, acting as the general and receiving agent for sales commissions, received half of each premium, retained 25%, and paid the remainder in commissions to the Community loan manager who made the sale and to his district supervisor. Thus, Community's

incentive plan was paid for by Diamond State, its sister subsidiary.

Given this business arrangement, Community's argument that the loan managers were selling the insurance policies strictly on behalf of American Family simply does not wash. To draw such a bright, bold line between the loan managers' dual functions would be to ignore reality, since a business relationship obviously existed between American Family and the Aristar conglomerate.[13] The fact that the loan managers were licensed agents of American Family does not indicate that they were working solely for that company, but rather that their licensing was a necessary part of the business venture between American Family and the Aristar group, just as Community's authorizing the sale of cancer policies at its loan offices was an essential part of the arrangement.[14]

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[13] We recognize that our analysis of this relationship involves the piercing of Aristar's corporate veil to a limited extent. We are willing to wield a sufficiently sharp instrument in these circumstances, for to recognize the Aristar companies as separate corporate entities would result in thwarting the clear legislative purpose of TIL: "to assure a meaningful disclosure of credit terms so that the customer will be able to . . . avoid the uninformed use of credit." 15 U.S.C. § 1601. *See also Mourning v. Family Publications, Inc.*, 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). We note that Georgia recognizes utilization of the "corporate veil" doctrine when "to observe [the corporate entity] would be to work an injustice." *Farmers Warehouse v. Collins*, 220 Ga. 141, 137 S.E.2d 619, 625 (1964).

In addition, various internal memoranda indicate that the profits from cancer insurance sales were going into one corporate "pot." For example, Community's president wrote his Diamond State counterpart that "[i]f we sold this policy to our customers, we would get an immediate commission. . . ." Record at 189. Under the plan, however, Diamond State would receive the commissions from the policies sold to Community's customers. *Cf. Stefanski v. Mainway Budget Plan, Inc., supra*, 456 F.2d at 212.

[14] The record makes clear, and the district court found, that the dominant force behind the plan was William W. Murphy, president of Community, chief operating officer of Aristar's financial division, and vice-president of Aristar's wholly-owned management subsidiary. Mr. Murphy participated in initial discussions with American Family representatives, touted the insurance sales program to his fellow corporate officers, and insisted that the program be tried on an experimental basis in Georgia. In addition, he authorized Community's loan managers in Georgia to serve as American Family's agents in writing cancer insurance, established policies and procedures for the loan managers to follow, approved a commission system, and directed that training sessions be held for the loan managers. Mr. Murphy also temporarily terminated the insurance program in April 1973 but subsequently permitted it to be re-established.



Given the existence of the business relationship described above, it follows that the loan managers acted on behalf of both American Family and Community in selling the cancer insurance policies. The sales could not have been made without the cooperation and agreement of both American Family and Community. For its part, Community authorized and encouraged every significant phase of the sales program, and the loan managers obviously could not have made on-the-job sales of this type of insurance without permission of the loan company. The loan managers thus made the insurance sales within the scope of their employment by Community, *see Restatement (2d) of Agency* § 229(1) (1957),[15] and the loan company is responsible as a principal for the actions of its agents. Accordingly, we hold that Community is a "seller" within the meaning of TIL.

*B. Disclosures*

Having determined that a "credit sale" occurred and that Community was a "seller," we now consider whether

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[15] The *Restatement* provides:

> To be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

Community made the disclosures required by 15 U.S.C. § 1638(a) and 12 C.F.R. § 226.8(c).[16]

Community does not, in its brief on appeal, challenge the district court's holding that the "credit sale" disclosures were not made. They undoubtedly were not. Under the statute and regulations, the cash price (here, the insurance premium) and the actual cost of the credit (*i. e.*, the finance charge) must be disclosed. All that was disclosed here was that a certain amount of money from the loan to the customer was being sent to American Family. *See* typical disclosure set out at slip op. page 1912, at page ——, *supra*. The only finance charge shown is that for the entire amount of the loan, and the consumer is thus unable to determine exactly what he is paying for the credit to enable him to purchase the insurance policy. As the district court said:

> By failing to make credit sale disclosures [regarding the insurance], defendants were able to extract painlessly an extra profit from loan customers, who in many cases simply signed or made their mark as instructed, and took home the proceeds, less deductions for various items including the cancer insurance premium. Truth-in-Lending was designed to require disclosure of the terms of credit sales, to insure that lenders would make borrowers aware of what they were agreeing to.

Record at 684.

*C. Penalty Awards*

Under the version of 15 U.S.C. § 1640(a) in effect when this suit was brought,[17] a creditor in a consumer credit

[16] *See* footnote 8, *supra*.

[17] The statute was amended in 1974, Pub.L. No. 93-495, Title IV, § 408(a) (Oct. 28, 1974), 88 Stat. 1518, and the parties stipulated in the district court that these amendments are not applicable to this action.



transaction who fails "to disclose to any person" any information required to be disclosed is liable to that person for an amount ranging from $100 to $1000—based on twice the finance charge—and reasonable attorneys' fees. Community contends that the district court erroneously held that each plaintiff was entitled to the minimum $100 award, since some plaintiffs were co-obligors on the same loan. Community argues that the proper measure of recovery is $100 per credit transaction, regardless of how many plaintiffs were involved in a particular loan.

This court recently held that a husband and wife who signed a promissory note and who were jointly and severally liable under state law were entitled to two statutory penalties. *Davis v. United Companies Mortgage & Inv., Inc.*, 551 F.2d 971 (5 Cir. 1977). Because plaintiffs such as the Touchstones were jointly and severally liable as principals under the terms of the note itself, the district court properly made an award to each.

**IV. Conclusion**

Community merchandised the Cancer-Care insurance policies through its loan offices as part of its overall business and extended credit for the purchase of that insurance. The company was thus a credit seller under TIL responsible for making "credit sale" disclosures to its customers. Those disclosures were not made, and each plaintiff is thus entitled to a statutory award. The McCarran Act is no bar to TIL's application here, since the lending activities of Community do not constitute the "business of insurance." The judgment of the district court is thus affirmed.

AFFIRMED.

JOHN R. BROWN, Chief Judge, dissenting:

The Court has affirmed the District Court's application of TIL in this case, but on different grounds than those on

which the District Court relied. The panel has held that TIL should be invoked because this case involves the financing, and not the sale, of insurance. Thus, under the Court's reasoning in *Perry v. Fidelity Union Life Insurance Company,* 606 F.2d at 468, McCarran is inapplicable. I dissent from this holding for two reasons.[1]

First, the Court has assumed, and I think correctly, that the Community loan managers made credit sales of cancer insurance. However, the Court was incorrect in bisecting the transaction into separate parts, a sale of insurance and a financing of the sale. The transaction was a credit sale. This is a species of sale, but a sale nonetheless. Although the McCarran Act is as inscrutable as Mona Lisa in many respects, there is one principle upon which the Court and I agree: the sale of an insurance policy is squarely within the "business of insurance," as is the licensing of agents, *ante,* 606 F.2d at 503. *SEC v. National Securities, Inc.,* 1969, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668. Therefore, McCarran should exempt the defendants from TIL if TIL would invalidate, impair or supersede applicable Georgia law.

Second, even if I could agree with the Court that the issue here is financing, separate and apart from the sale of insurance, I would still disagree with their result for reasons stated in my dissent in *Perry, ante,* 606 F.2d at 475-478. The Court has assumed that Community was an insurance seller. I am convinced that financing of premiums by the one selling the insurance is part of the "business of insurance" which is covered by the McCarran Act. When an insurance seller offers premium financing in conjunction with the sale of insurance, this financing is an inducement to the purchaser to buy. It is such an integral part of the actual sale that the insurer-insured relationship, emphasized in *National Securities,* 393 U.S. at 460,

[1] I now concur in Part III of the Court's opinion concerning Truth in Lending matters.



89 S.Ct. 564, is directly involved. This is the "business of insurance" which McCarran exempts from federal control.

Having expressed my opinion on this issue in favor of the application of the McCarran Act, I now must, as I did in my dissent in *Perry, ante,* 606 F.2d at 475, apply the analytical construction of *Cochran v. Paco,* 606 F.2d at 464, to the questions not addressed by the Court: (i) whether Georgia regulates the business of insurance within the meaning of § 2(b) and (ii) if so, whether application of TIL would invalidate, impair or supersede applicable state law.

The District Court held in effect that Georgia did not regulate the business of insurance because insurance companies and their agents are exempted from the only Georgia statute directed toward credit disclosures.[2] The Court went further to state that even if Georgia required insurance companies to disclose credit terms, there would be no invalidation, impairment or supersession of state law in view of § 111 of TIL, 15 U.S.C.A. § 1610.[3] I cannot agree.

[2] The District Court reasoned as follows:

> To apply the McCarran-Ferguson Act as broadly as defendants suggest would effectively bar the application of any federal statute *relevant* to the business activities of insurance companies regardless of whether state legislation covered the specific transaction in question or not.

Feb. 28, 1975 opinion, R. at 529, App. at 47 (emphasis added). But barring the application of any federal statute enacted under the Commerce Clause in the absence of a clear Congressional expression *specifically relating* that act to the business of insurance (as opposed to a "relevant" test) is exactly what the McCarran Act is all about. *See* dissent in *Perry, ante,* 606 F.2d at 473-474 & nn. 8-10, 475, 483.

[3] The Court in effect held that Georgia did not regulate this aspect of the business of insurance, and even if it did, there was no conflict with federal law:

> However, defendants cite no Georgia legislation specifically overriding or superseding the Truth-in-Lending Act, nor do

Inherent in the District Court's conclusion is the assumption that to exempt insurance agents or premiums in connection with sickness insurance is tantamount to a failure to regulate for McCarran Act purposes. This assumption eviscerates McCarran and effects its repeal—the precise result its authors so assiduously sought to avoid. See dissent in *Perry, ante,* 606 F.2d at 473-474 & n. 10, and Appendix excerpts [2], [4]-[6], [22], *ante,* 606 F.2d at 484. Moreover, pronouncing that Georgia does not

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they demonstrate how application of this Act would interfere with state legislation. Moreover, research reveals that the only Georgia statute directed toward disclosures accompanying sales of insurance exempts all insurance companies and their local agents from its coverage. Ga.Code.Ann. §§ 84-5302 and 84-5309. Therefore, no conflict exists between requirements under Georgia law and under the Truth-in-Lending Act. And even if the State of Georgia had passed legislation requiring disclosures in the sale of insurance, the Truth-in-Lending Act could not be interpreted as invalidating, impairing, or supersedeing state law since section 111 of the Act specifically provides that "[t]his title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of the State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of their inconsistency." 15 U.S.C. § 1610(a). Consequently, the Federal Reserve Board has determined that the credit sale of insurance is governed by the Truth-in-Lending Act.

Logic also dictates the rejection of the defendants' position. To apply the McCarran-Ferguson Act as broadly as defendants suggest would effectively bar the application of any federal statute relevant to the business activities of insurance companies regardless of whether state legislation covered the specific transaction in question or not. This interpretation justifiably has not been accorded the McCarran Act by federal courts in other contexts. *E. g., Atlantic & Pacific Insurance Co. v. Combined Ins. Co.,* 312 F.2d 513, 515 (10th Cir. 1962); *Sears, Roebuck & Co. v. All States Life Insurance Co.,* 246 F.2d 161, 172 (5th Cir. 1957); *Zachman & Erwin,* 186 F.Supp. 691, 694 (S.D. Texas 1960).



regulate within the meaning of § 2(b) by exempting insurance companies from making premium credit disclosures strips that State of the right granted to it under the McCarran Act to regulate in a manner it deems best in a situation where Congress has not specifically related the statute to the business of insurance.[4] See dissent in *Perry, ante,* 606 F.2d at 475, and *Cochran, ante,* 606 F.2d at 464 and authorities cited therein.

First, Georgia comprehensively regulates the business of insurance and the sale of insurance policies. *See generally* Ga.Code Title 56. There is no doubt about this and plaintiffs do not contend otherwise. Second, Georgia has regulated the financing of insurance premiums through the Georgia Insurance Premium Finance Company Act, Ga.Code Ann. § 84-5301. The Georgia Legislature has also mandated that credit disclosures be made in insurance premium financing arrangements. Ga.Code Ann. § 84-5309 (c). But what is significant here is the fact that Georgia specifically and affirmatively exempted from the requirements of this Act not only "[a]ny insurance company authorized to do business in the State of Georgia or *any licensed resident local agent as to premiums on business produced by such agent*" (Ga.Code Ann. § 84-5302(a)), but also "[i]nsurance premiums in connection with the kinds of business defined in . . . section 56-404 (accident and *sickness* insurance) of the Georgia Insurance Code" (Ga. Code Ann. § 84-5302(e); emphasis added).

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[4] The plaintiffs maintained below and asserted at oral argument that TIL specifically relates to the business of insurance. The District Judge did not reach the issue because he found no invalidation, impairment or supersession of state law. The Court holds in *Cochran* that TIL does not specifically relate to the business of insurance, *see ante,* 606 F.2d at 464 and authorities there cited.

Plaintiffs also assert that 15 U.S.C.A. § 1633 provides the exclusive mechanism by which states can exempt credit transactions from TIL's requirements. I rejected this same contention in my dissent in *Perry, ante,* 606 F.2d at note 34, p. 483.

I would hold that these exemptions fall squarely within the Fifth Circuit standard for "regulating" announced in *Crawford v. American Title Ins. Co.*, 1975, 518 F.2d 217, 218, which I followed in my dissent in *Perry, ante,* 606 F.2d at 481-482.

> The McCarran Act renders the federal [act] inapplicable when state legislation generally proscribes, *permits* or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision.

(Emphasis added.) Georgia has chosen to *permit* insurance agents not to make the credit term disclosures mandated in Ga.Code Ann. § 84-5309(c). Thus, even assuming, as plaintiffs urge, that the "conduct in question" is making credit term disclosures rather than selling insurance policies, the *Crawford* test is satisfied.

As to the final question, were we to place our imprimatur on the District Court's reading of McCarran, we would not only be superimposing additional requirements, which I declined to do in my dissent in *Perry, ante,* 606 F.2d at 482-483, but we would be construing TIL to invalidate completely the Georgia exemptions in direct contravention of § 2(b). We can think of no clearer "conflict," to use the District Court's term,[5] than exists where a state has *affirmatively* relieved insurance companies and their agents and certain premiums from credit disclosure requirements. The nonaction—purposeful and noninadvertent—that is expressly legal for an insurance agent in Georgia would be expressly illegal under federal law.[6] TIL's application

[5] The mere absence of conflict is not the litmus test for applying McCarran. "Invalidate, impair, or supersede" includes the displacement of, or the superimposition of federal requirements on, transactions that are tailored to meet state requirements. Dissent in *Perry, ante,* 606 F.2d at 482-483.

[6] It has long been a settled McCarran principle that the states can make legal activities of insurance companies—uniform rates, for example—that would otherwise be illegal under federal law as long as § 2(b) standards are met and these activities do not constitute boycott, coercion or intimidation within 15 U.S.C.A. § 1013(b). *E.g., Dexter v. Equitable Life Assurance Society,* 2 Cir., 1975, 527 F.2d 233, 236; *Meicler v. Aetna Casualty & Surety Co.,* 5 Cir., 1975, 506 F.2d 732; *Perry* dissent Appendix, *ante,* 606 F.2d at 484, excerpts [2], [16], [19].



would thus amount to invalidation with a vengeance and reduce McCarran to a nullity.

The plaintiffs argue and I acknowledge that the result I would reach here would mean that no credit sale disclosures have to be made by insurance companies and their agents in Georgia.[7] But this Court has no charter to cure that. Georgia has demonstrated, by enactment of the Premium Finance Company Act, its know-how and ability to impose disclosure requirements when it chooses to do so. Congress has displayed equivalent abilities in specifically relating federal legislation to the insurance business; witness, for example, its action with respect to the National Labor Relations Act and the Fair Labor Standards Act, 15 U.S.C.A. § 1014. When and if these legislative bodies subsequently decide that insurance companies and agents should not enjoy this immunity, they will find an obedient ear in the Fifth Circuit. Until then, we must confine our legislative activities to "molecular motions." [8]

[7] In *Cochran, ante,* 606 F.2d at 460 we held that independent insurance premium finance companies were not exempted from making such disclosures by virtue of the McCarron Act because their activities were not part of the "business of insurance" within the meaning of § 2(b).

[8] I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

*Southern Pacific Co. v. Jensen,* 1917, 244 U.S. 205, 221, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (Holmes, J., dissenting).

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1687

D. C. Docket No. CA 1863 & CA 1864

JESSIE CODY, SALLIE MAE CODY and all others similarly situated, *Plaintiffs-Appellees,*

v.

COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY, *Defendant-Appellant.*

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON and all others similarly situated, *Plaintiffs-Appellees,*

v.

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA, *Defendant-Appellant.*

**Appeal from the United States District Court for the Southern District of Georgia**

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the defendant-appellant pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 2, 1979

Brown, Chief Judge, dissenting.
Issued As Mandate:

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

December 11, 1979

Gilbert F. Ganucheau
Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

To All Parties Listed Below:

No. 76-1687
Jessie Cody, et al.
vs.
Community Loan Corporation of
Richmond County, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk
By /s/ Sally Hayward
Deputy Clerk

cc: Messrs. W. Rhett Tanner, Richard W. Kirby
Mr. T. J. Foss
Mr. Ernest V. Harris
Mr. John L. Cromartie, Jr.
Mr. Harry W. Pettigrew

## APPENDIX G

### McCarran-Ferguson Act
### 15 U.S.C. §§ 1011-1015

**§ 1011. Declaration of policy**

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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**§ 1012. Regulation by State law: Federal law relating specifically to insurance: applicability of certain Federal laws after June 30, 1948**

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

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**§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation**

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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**§ 1014. Applicability of National Labor Relations Act and the Fair Labor Standards Act of 1938**

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [29 U.S.C. 151 et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 [29 U.S.C. 201 et seq.], or the Act of June 5, 1920, known as the Merchant Marine Act, 1920 [46 U.S.C. 861 et seq. and 911 et seq.].

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**§ 1015. Definition of "State"**

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

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## APPENDIX H

### Excerpts from the Truth-in-Lending Act

### 15 U.S.C. §§ 1602, 1631, 1638-40

**§ 1602. Definitions and rules of construction**

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise. For the purposes of the requirements imposed under Part D of this subchapter and sections 1637(a)(6), 1637(a)(7), 1637(a)(8), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(9), and 1637(b)(11) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Board shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open

end credit plans. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

(i) The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

(j) The term "adequate notice", as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.



(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(*l*) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

(*o*) The term "unauthorized use", as used in section 1643 of this title, means the use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

(p) The term "discount" as used in section 1666f of this title means a reduction made from the regular price. The term "discount" as used in section 1666f of this title shall not mean a surcharge.

(q) The term "surcharge" as used in section 1602 and section 1666f of this title means any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check, or similar means.

(r) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(s) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference

to the regulations of the Board under this subchapter or the provision thereof in question.

(t) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this subchapter does not in itself constitute a violation of this subchapter.

* * * * * * * * * *

PART B—CREDIT TRANSACTIONS

**§ 1631. Disclosure requirements—clear and conspicuous disclosure to person extended consumer credit**

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this part or part D of this subchapter.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part or part D of this subchapter to more than one of them.

* * * * * * * * * *

**§ 1638. Sales not under open end credit plans—Required disclosures by creditor**

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.



(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

(c) If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price

and the deferred payment price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) of this section made by made at any time not later than the date the first payment is due.

(d) If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addition of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosure required under subsection (a) of this section for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

**§ 1639. Consumer loans not under open end credit plans—Required disclosures by creditor**

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.



(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an extension of consumer credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this part, the disclosures required by subsection (a) of this section shall be made before the credit is extended, and may be made by

disclosing the information in the note or other evidence of indebtedness to be signed by the obligor.

(c) If a creditor receives a request for an extension of credit by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

**§ 1640. Civil liability—Individual or class action for damages; amount of award; factors determining amount of award**

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and



(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(b) A creditor has no liability under this section for any failure to comply with any requirement imposed under this part or part E of this subchapter if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a charge in excess of the amount or percentage rate actually disclosed.

(c) A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was

involuntary, or the assignee shows by preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this part, and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries.

(h) A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) of this section against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person has been determined by judgment of a court of competent jurisdiction in an action to which such person was a party.



## APPENDIX I

### Excerpts from Regulation Z of the Board of Governors of the Federal Reserve System

### 12 C.F.R. §§ 226.6(d), 226.8(b)-(d)

**§ 226.6 General disclosure requirements.**

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(d) *Multiple creditors or lessors; joint disclosure.* If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension or credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8 or paragraph (b) of § 226.15.

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**§ 226.8 Credit other than open end—specific disclosures.**

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(b) *Disclosures in sale and nonsale credit.* In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(1) The date on which the finance charge begins to accrue if different from the date of the transaction.

(2) The finance charge expressed as an annual percentage rate, using the term "annual percentage rate," except in the case of a finance charge.

(i) Which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(ii) Which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate, nor may any other percentage rate be disclosed if none is stated in reliance upon paragraph (b)(2)(i) or (ii) of this section.

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the sum of such payments using the term, "total of payments."[10] If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain

[10] The disclosures required by this sentence need not be made with respect to interim student loans made pursuant to federally insured student loan programs under Pub. L. 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.



reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

(6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

(8) If the annual percentage rate as disclosed under § 226.8(b)(2) is prospectively subject to increase,[10a] the following additional disclosures shall be made:

(i) The fact that the annual percentage rate is subject to increase and the conditions under which such rate may

[10a] For this purpose, the phrase "prospectively subject to increase" does not apply to increases in the annual percentage rate upon such occurrences as default, acceleration, late payment, assumption or transfer of property.

increase, including: (A) Identification of the index, if any, with respect to which such increase in annual percentage rate is tied; and (B) any limitation on such increase;

(ii) The manner(s) (such as an increase in payment amounts, number of scheduled periodic payments, or in the amount due at maturity) in which any increase in the annual percentage rate may be effected;

(iii) If the obligation is repayable in substantially equal installments at substantially equal intervals (including those obligations providing for "balloon" payments) and the increase could be effected by an increase in the periodic payment amount, a statement of the estimated increase in the amount of the payment caused by a hypothetical immediate increase of one quarter of one percentage point, based upon the number of scheduled periodic payments and original amount financed disclosed at consummation;

(iv) If the obligation is repayable in substantially equal installments at substantially equal intervals (including those obligations providing for "balloon" payments) and the increase could be effected by an increase in the number of periodic payments, a statement of the estimated increase in the number of periodic payments caused by a hypothetical immediate increase of one quarter of one percentage point, based upon the periodic payment amount and the original amount financed disclosed at consummation.

Any increase in the annual percentage rate within the conditions or limitations disclosed in accordance with this paragraph is a subsequent occurrence under § 226.6(g) and is not a refinancing under § 226.8(j).

The disclosures required under § 226.8(b)(8)(iii) and (iv) need be made only in transactions in which a security interest is taken in real property used or expected to be used as the customer's dwelling, and they need not be made in transactions primarily for agricultural purposes, transactions in which the obligation is repayable in substantially equal installments which do not include repayments of principal, or transactions in which disclosures are made pursuant to § 226.814.



(c) *Credit sales.* In the case of a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The cash price of the property or service purchased, using the term "cash price."

(2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "cash downpayment," downpayment in property, using the term "trade-in" and the sum, using the term "total downpayment."

(3) The difference between the amounts described in paragraphs (c)(1) and (2) of this section, using the term "unpaid balance of cash price."

(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.

(5) The sum of the amounts determined under paragraphs (c)(3) and (4) of this section, using the term "unpaid balance."

(6) Any amounts required to be deducted under paragraph (e) of this section using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term "total prepaid finance charge and required deposit balance."

(7) The difference between the amounts determined under paragraphs (c) (5) and (6) of this section, using the term "amount financed."

(8) Except in the case of a sale of a dwelling:

(i) The total amount of the finance charge, using the term "finance charge," and where the total charge consists of two or more types of charges, a description of the amount of each type, and

(ii) The sum of the amounts determined under paragraphs (c) (1), (4), and (8)(i) of this section, using the term "deferred payment price."

(d) *Loans and other nonsale credit.* In the case of a loan or extension of credit which is not a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

(2) Any amount referred to in paragraph (e) of this section required to be excluded from the amount in paragraph (d)(1) of this section, using, as applicable, the terms "prepaid finance charge" and "required deposit ballance," and, if both are applicable, the total of such items using the term, "total prepaid finance charge and required deposit balance."

(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge,[11] using the term "finance charge," and where the total charge consists of two or more types of charges, a description of the amount of each type.

[Footnote omitted.]



## APPENDIX J

### Insurance Premium Finance Company Act of the State of Georgia Ga. Code Ann. § 84-5301, et seq.

**84-5301 Short title**

This Chapter shall be known and may be cited as the "Insurance Premium Finance Company Act."

**84-5302 Application**

The provisions of this Chapter shall not apply with respect to:

(a) Any insurance company authorized to do business in the State of Georgia or any licensed resident local agent as to premiums on business produced by such agent;

(b) Any bank, trust company, savings and loan association, credit union or other lending institution authorized to transact business in this State that does not possess or acquire any right, title or interest with respect to the insurance policy for which the premiums are financed other than in the proceeds thereof in the event of loss;

(c) The inclusion of a charge for insurance in connection with an installment sale in accordance with Chapter 96-9.

(d) The financing of insurance premiums in this State in accordance with the provisions of Chapter 57-1 relating to rates of interest.

(e) Insurance premiums in connection with the kinds of business defined in section 56-402 (life insurance) and section 56-404 (accident and sickness insurance) of the Georgia Insurance Code.

**84-5303 Definitions**

For the purposes of this Chapter—

(a) "Insurance premium financing company" means a person engaged in the business of entering into insurance premium finance agreements.

(b) "Insurance premium finance agreement" means an agreement by which an insured or prospective insured promises to pay to a premium finance company the amount advanced or to be advanced under the agreement to an insurer or to an insurance agent or insurance broker in payment of premiums on an insurance contract together with a service charge as authorized and limited by this Chapter.

(c) "Licensee" means an insurance premium finance company holding a license issued by the commissioner under this Chapter.

(d) "Commissioner" means the State Insurance Commissioner.

**84-5304 Licenses**

No person shall engage in the business of financing insurance premiums in this State without first having obtained a license as a premium finance company from the commissioner.

The annual license fee shall be $250. Licenses may be renewed from year to year as of March 1 of each year upon payment of the fee of $250. The fee for said license shall be paid to the commissioner for the use of the State.

Before any licensee changes his address he shall return his license to the commissioner who shall endorse the license indicating the change.

The person to whom the license or the renewal thereof may be issued shall file sworn answers, subject to the penalties of perjury, to such interrogatories as the commissioner may require. The commissioner shall have authority, at any time, to require the applicant fully to disclose the identity of all stockholders, partners, officers and employees, and he may, in his discretion, refuse to issue or renew a license in the name of any firm, partnership or corporation if he is not satisfied that any officer, employee, stockholder, or partner thereof who may materially influence the applicant's conduct meets the standards of this Chapter.



**84-5304.1 Additional requirements for a license; bond or deposit; minimum capital**

From and after March 1, 1976, no license shall be issued to any applicant for a license or renewal license under this Chapter unless such applicant:

(a) Shall possess and thereafter maintain a minimum balance of at least $5,000 in its capital account as shown in its annual report to the commissioner: Provided, however, the commissioner shall in his discretion require such higher amounts of capital as he deems necessary for the protection of the public; and

(b) Shall deposit with the commissioner securities acceptable to the commissioner in the amount of $25,000; or

(c) Shall file with the commissioner a bond to be approved by the commissioner and made payable to the commissioner or his successor in office executed by such applicant as principal and by a corporate surety authorized to do business in this State in the penal sum of $25,000 conditioned that the licensee will conduct his business in accordance with the provisions of this Chapter and the laws of this State, and that the licensee will properly account for all monies collected in connection therewith. Such bond shall remain in full force and effect until the surety is released from liability by the commissioner or until the bond

is cancelled by the surety and no such bond shall be cancelled or terminated unless prior to such cancellation or termination 30 days written notice is filed with the commissioner.

**84-5305 Action by commission on application**

Upon the filing of an application and the payment of the license fee, the commissioner shall make an investigation of each applicant and shall issue a license if he finds the applicant is qualified in accordance with this Chapter. If the commissioner does not so find, he shall, within 30 days after he has received such application, so notify the applicant and, at the request of the applicant, give the applicant a full hearing.

The commissioner shall issue or renew a license as may be applied for when he is satisfied that the person to be licensed—

(a) Is competent and trustworthy and intends to act in good faith in the capacity involved by the license applied for;

(b) Has a good business reputation and has had experience, training, or education so as to be qualified in the business for which the license is applied for;

(c) If a corporation is a corporation, incorporated under the laws of this State or a foreign corporation, authorized to transact business in this State; and

(d) Will contribute to and promote the convenience and advantage of the citizens of this State by providing a necessary additional market for the financing of insurance premiums.



**84-5306 Revocation and suspension of licenses**

The commissioner may revoke or suspend the license of any premium finance company when and if after investigation the commissioner finds that:

(a) Any license issued to such company was obtained by fraud;

(b) There was any misrepresentation in the application for the license;

(c) The holder of such license has otherwise shown himself untrustworthy or incompetent to act as a premium finance company;

(d) The holder of such license has misappropriated, converted, illegally withheld, or refused to pay over upon proper demand any moneys entrusted to the holder in its fiduciary capacity belonging to an insurer or insured;

(e) The holder is found to be in an unsound condition or in such condition as to render the future transaction of business in this State hazardous to the public.

(f) Such company has violated any of the provisions of this Chapter. Before the commissioner shall revoke, suspend, or refuse to renew the license of any premium finance company, he shall give to such person an opportunity to be fully heard and to introduce evidence in his behalf. In lieu of revoking or suspending the license for any of the causes enumerated in this section, after hearing, as herein provided, the commissioner shall have the authority to place the premium finance company on probation for a period of time not to exceed one year and may subject such company to a penalty of not more than $1,000 for each offense when, in his judgment, he finds that the public interest would not be harmed by the continued operation of such company. The amount of any such penalty shall be paid by such company to the commissioner for the use of the State. At any hearing provided by this section, the

commissioner shall have the authority to administer oaths to witnesses. Anyone testifying falsely, after having been administered such oath, shall be subject to the penalty of perjury.

Any action of the commissioner in refusing to issue or renew a license shall be subject to review as provided in Chapter 56-2.

**84-5307 Books and records**

Every licensee shall maintain records of its premium finance transactions and the said records shall be open to examination and investigation by the commissioner. The commissioner may, at any time, require any licensee to bring such records as he may direct to the commissioner's office for examination, or if he deems it necessary, the commissioner or his duly authorized representative may conduct an examination of such records on the premises of the licensee. The expense of any on-the-premises examination shall be borne by the licensee, but shall not exceed $250.

Every licensee shall preserve its records of such premium finance transactions, including cards used in a card system, for at least three years after making the final entry in respect to any premium finance agreement. The preservation of records in photographic form shall constitute compliance with this requirement.

**84-5308 Power to make rules**

The commissioner may make and enforce such reasonable rules and regulations as may be necessary in making effective the provisions of this Chapter, but such rules and regulations shall not be contrary to nor inconsistent with the provisions of this Chapter.



**84-5309 Form of premium finance agreement**

A premium finance agreement shall—

(a) Be dated, signed by or on behalf of the insured, and the printed portion thereof shall be in at least eight-point type;

(b) Contain the name and place of business of the insurance agent or insurance broker negotiating the related insurance contract, the name and residence or place of business of the insured as specified by him, the name and place of business of the premium finance company to which payments are to be made, a description of the insurance contracts involved and the amount of the premium therefor; and

(c) Set forth the following items, where applicable:

(1) The total amount of the premiums;

(2) The amount of the down payment;

(3) The principal balance (the difference between items (1) and (2));

(4) The amount of the service charge, including the additional charge of up to $12;

(5) The balance payable by the insured (sum of items (3) and (4));

(6) The number of payments required, the amount of each payment expressed in dollars, and the due date or period thereof.

The items set out in subsection (c) of this section need not be stated in the sequence or order in which they appear in such clause, and additional items may be included to explain the computations made in determining the amount to be paid by the insured.

The licensee or the insurance agent or insurance broker shall deliver to the insured, or mail to him at his address shown in the agreement, a complete copy of the agreement.

**84-5310 Maximum service charge**

A premium finance company shall not charge, contract for, receive, or collect a service charge other than as permitted by this Chapter.

The service charge shall be computed on the balance of the premiums due (after subtracting the down payment made by the insured in accordance with the premium finance agreement) from the effective date of the insurance coverage, for which the premiums are being advanced, to and including the date when the final payment of the premium finance agreement is payable.

The service charge shall be a maximum of $7 per $100 per annum plus an additional charge, which shall not exceed $12 per premium finance agreement, which additional charge need not be refunded upon prepayment. However, any insured may prepay his premium finance agreement in full at any time before due date of the final payment and in such event the unearned service charge shall be refunded in accordance with the Rule of 78 and shall represent at least as great a proportion of the service charge, if any, as the sum of the periodic balances after the month in which prepayment is made bears to the sum of all periodic balances under the schedule of payments in the agreement.

**84-5311 Delinquency charges**

A premium finance agreement may provide for the payment by the insured of a delinquency charge of $1.50 to a maximum of five per cent. of the delinquent payment, but not to exceed $5 on any payment which is in default for a period of five days or more. If the default results in the cancellation of any insurance contract listed in the agreement, the agreement may provide for the payment by the insured of a cancellation charge; such charge shall be $5, less any delinquency charge on the payment in default.



**84-5312 Cancellation of insurance contract upon default**

(a) When a premium finance agreement contains a power of attorney enabling the premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be canceled by the premium finance company unless such cancellation is effectuated in accordance with this section.

(b) Not less than 10 days' written notice shall be mailed to the insured of the intent of the premium finance company to cancel the insurance contract unless the default is cured within such 10-day period. A copy of said notice shall also be sent to the insurance agent or insurance broker indicated on the premium finance agreement.

(c) After expiration of such 10-day period, the premium finance company may thereafter in the name of the insured, cancel such insurance contract or contracts by mailing to the insurer a notice of cancellation, and the insurance contract shall be canceled as if such notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract or contracts. The premium finance company shall also mail a valid notice of cancellation to the insured at his last known address and to the insurance agent or insurance broker indicated on the premium finance agreement.

(d) All statutory, regulatory, and contractual restrictions providing that the insurance contract may not be canceled unless notice is given to a governmental agency, mortgagee, or other third party shall apply where cancellation is effected under the provisions of this section. The insurer shall give the prescribed notice in behalf of itself or the insured to any governmental agency, mortgagee, or

other third party on or before the second business day after the day it receives the notice of cancellation from the premium finance company and shall determine the effective date of cancellation taking into consideration the number of days required to complete the cancellation.

**84-5313 Application of unearned premiums**

(a) Whenever a financed insurance contract is cancelled, the insurer, on written notice of such financing, shall return whatever unearned premiums are due under the insurance contract to the premium finance company, either directly or via the agent, agency or broker placing the insurance, for the account of the insured or insureds: Provided, however, that if the insurer elects to return such unearned premiums to the premium finance company for the account of the insured or insureds, via the agent, agency or broker placing such insurance, the insurer shall be directly responsible to the premium finance company for any and all unearned premiums due to the premium finance company under the contract which are not properly returned to the premium finance company: and Provided, further, that, regardless of the method of the routing of the return of such unearned premiums to the insured, or insureds, the insurer, the premium finance company and any agent, agency or broker involved in the return of such unearned premiums shall be jointly and severally liable to the insured or insureds for any and all unearned premiums due to the insured or insureds under the policy or contract which are not properly returned to the insured or insureds.

(b) In the event that the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium finance company shall refund such excess to the insured via his insurance agent, agency or broker, provided that no such refund shall be required if it amounts to less than $1.



(c) When a financed insurance contract is cancelled, the insurer shall file with the agenct, agency or broker placing the insurance, a report setting forth an itemization of the unearned premiums under such policy, and the finance company shall file with the agent, agency or broker placing the insurance, a report setting forth an itemization of the unearned finance and other charges under such finance contract.

**84-5314 Exemption from any filing requirements**

No filing of the premium finance agreement shall be necessary to perfect the validity of such agreement as a secured transaction as against creditors, subsequent purchasers, pledgees, encumbrances, successors, or assigns.

**84-5315 Existence of agreement; notification of insurers**

Any premium finance company which enters into a premium finance agreement under the provisions of this Chapter shall notify the insurer whose premiums are being financed of the existence of such agreement within a reasonable period of time not to exceed 30 days after the date such agreement is signed.

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## APPENDIX K

**Excerpts from Georgia Insurance Code Chapter 56-7**
**Ga. Code Ann. §§ 56-701 through 56-704(2), 56-712(5)**

### Chapter 56-7. Unfair Trade Practices

**56-701 Declaration of purpose of Chapter**

The purpose of this Chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

**56-702 Definition of person**

When used in this Chapter, "person" shall mean an individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including, but not limited to, agents, brokers, counselors and adjusters.

**56-703 Unfair methods of competition or unfair and deceptive acts or practices prohibited**

No person shall be engaged in this State in any trade practice which is defined in this Chapter as, or determined pursuant to this Chapter to be, an unfair method or competition or an unfair or deceptive act or practice in the business of insurance.

**56-704 Unfair methods of competition and unfair or deceptive acts or practices defined**

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and false advertising of policy contracts.—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance. A dividend estimate prepared on company forms clearly indicating in type equal in size to that used in figures showing amounts of estimated dividends that such dividends are based on estimates made by the company based upon past experience of such company shall not be considered misrepresentation and false advertising within the meaning of this subsection.

(2) False information and advertising generally.—Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

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**56-712 Definitions of unfair methods and practices continued**

In addition to section 56-704, violations of the following provisions also are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

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(5) Illegal dealing in premiums; excess or reduced charges for insurance.—

(a) No person shall knowingly collect any sum as premium or charge for insurance, which insurance is not then provided or not in due course to be provided (subject to acceptance of the risk by the insurer) by an insurance policy issued by an insurer as permitted by this Title.

(b) No insurer or agent thereof shall hypothecate, sell, or dispose of a promisory note received in payment of any part of a premium on a policy of insurance applied for prior to acceptance of the risk by the insurer.

(c) No person shall knowingly collect as premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, and as specified in the policy, in accordance with the applicable classifications and rates as filed with and approved by the commissioner; or, in cases where classifications, premiums, or rates are not required by this Title to be so filed and approved, such premiums and charges shall not be in excess of or less than those specified in the policy and as fixed by the insurer. This provision shall not be deemed to prohibit the charging and collecting, by surplus line brokers licensed under Chapter 56-6, of the amount of applicable state and federal taxes in addition to the premium required by the insurer. Nor shall it be deemed to prohibit the charging and collecting, by a life or accident and sickness insurer, of amounts actually to be expended for medical examination of an applicant for life, accident and sickness insurance or for reinstatement of a life, accident and sickness insurance policy.

(d) Notwithstanding the provisions of this section or any other law limiting or regulating interest rates or other charges, any insurance agent, agency, or broker as defined in section 56-801b of this Insurance Code shall be authorized, but not required, to charge, receive and collect on any unpaid premium account with a balance owing for 30 days or more a service charge which shall not exceed 15 cents per $10 per month computed on all amounts unpaid thereon from month to month (which need not be a calendar month) or other regular period; however, if the amount of service charge so computed shall be less than $1 for any such month, a service charge of $1 for any such month may be charged, received and collected. Nothing contained herein shall be construed to prevent an agent, agency or broker from cancelling a policy in accordance with the laws of the State.

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## APPENDIX L

**Excerpts from Georgia Insurance Code Chapter 56-8A**
**Ga. Code Ann. §§ 56-803a, 56-813a(1)**

CHAPTER 56-8A. AGENTS AND COUNSELORS—LIFE, ACCIDENT AND SICKNESS

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**56-803a Necessity for license; doing business with unlicensed agent prohibited**

(1) No person shall act as an agent or as a counselor within this State until he shall have first procured a license from the commissioner.

(2) No insurer shall issue, make, write, place or cause to be made, written, placed or issued any contract of life, or accident and sickness insurance in this State except through an agent who is licensed, pursuant to the provisions of this Chapter, at the time when the application for the contract of insurance is written.

(3)(a) No insurer or agent doing business in this State shall pay, directly or indirectly, any commission or any other valuable consideration to any person for services as an agent within this State, unless such person shall hold a currently valid license to act as an agent as required by the laws of this State; except that an insurer may pay such commission or other valuable consideration to, and a licensed insurance agent may share any commission or other valuable consideration with, an incorporated insurance agency in which all employees, stockholders, directors or officers who solicit, negotiate or effectuate insurance contracts are qualified insurance agents holding a currently valid license as required by the laws of this State.

(b) No person, partnership or corporation, other than a duly licensed agent or any agency as herein defined, shall accept any such commission or other valuable consideration, except as provided in subsection (a).

(c) Provided, however, that the provisions of this section shall not prevent the payment or receipt of renewal or other deferred commissions to or by any person solely because such person has ceased to hold a license to act as an agent and shall not prevent the payment of renewal or other deferred commissions to any incorporated insurance agency solely because any of its stockholders has ceased to hold a license to act as an insurance agent.

(d) Provided, further, that the provisions of this section shall not prevent the payment or receipt of any commission or any other valuable consideration to or by a person who has applied for a temporary license pursuant to section 56-811a, subsection (3), pending issuance of such temporary license.

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**56-813a Refusal, suspension or revocation of license; notice; hearing; revocation as bar to issuance of new license; appeal**

(1) A license may be refused, or a license duly issued may be suspended or revoked or the renewal thereof refused by the commissioner if, after notice and hearing as hereinafter provided, he finds that the applicant for, or holder of such license:

(a) Has wilfully violated any provision of the insurance laws of this State; or

(b) Has intentionally made any material misstatement in the application for such license; or

(c) Has obtained, or attempted to obtain, such license by fraud or misrepresentation; or

(d) Has misappropriated or converted to his own use or illegally withheld money belonging to an insurer or an insured or beneficiary; or

(e) Has otherwise demonstrated lack of trustworthiness or competence to act as an agent or counselor; or



(f) Has been guilty of fraudulent or dishonest practice; or

(g) Has materially misrepresented the terms and conditions of insurance policies or contracts; or

(h) Has made or issued, or caused to be made or issued, any statement misrepresenting or making incomplete comparisons regarding the terms or conditions of any insurance or annuity contract legally issued by any insurer, for the purpose of inducing or attempting to induce the owner of such contract to forfeit or surrender such contract or allow it to lapse for the purpose of replacing such contract with another; or

(i) Has obtained, or attempted to obtain such license, not for the purpose of holding himself out to the general public as an agent or counselor, but primarily for the purpose of soliciting, negotiating or procuring insurance or annuity contracts covering himself or members of his family, or the officers, directors, stockholders, partners, employees, of a partnership, association, or corporation of which he or a member of his family is an officer, director, stockholder, partner or employee.

## APPENDIX M

**Excerpts from Georgia Insurance Code Chapter 56-24**
**Ga. Code Ann. §§ 56-2410-11, 56-2413**

CHAPTER 56-24. THE INSURANCE CONTRACT IN GENERAL

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**56-2410 Filing and approval of forms**

(1) No basic insurance policy or annuity contract form, or application form where written application is required and is to be made a part of the policy or contract, or printed rider or endorsement form or form of renewal certificate, shall be delivered or issued for delivery in this State, unless the form has been filed with and approved by the commissioner. This provision shall not apply to surety bonds, or to specially rated inland marine risks, nor to policies, riders, endorsements, or forms of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or accident and sickness insurance policies and are used at the request of the individual policyholder, contract holder, or certificate holder.

(2) Every such filing shall be made not less than 90 days in advance of any such delivery. At the expiration of such 90 days the form so filed shall be deemed approved unless prior thereto it has been approved or disapproved by the commissioner. Approval of any such form by the commissioner shall constitute a waiver of any unexpired portion of such waiting period. The commissioner may extend by not more than an additional 90 days the period within which he may so approve or disapprove any such form by giving notice of such extension before expiration of the initial 90-day period. At the expiration of any such period as so extended, and in the absence of such prior approval or disapproval, any such form shall be deemed approved. The commissioner may at any time, after notice and for

cause shown, withdraw any such approval after notice and hearing as provided in sections 56-218 through 56-227.

(3) Any order of the commissioner disapproving any such form or withdrawing a previous approval shall state in reasonable detail the grounds therefor.

(4) The commissioner may by order, in exceptional cases, exempt from the requirements of this section for so long as he deems proper any insurance document or form or type thereof as specified in such order, to which, in his discretion, this section may not practicably be applied, or the filing and approval of which are, in his discretion not desirable or necessary for the protection of the public.

(5) This section shall apply also to any such form used by domestic insurers for delivery in a jurisdiction outside this State, if the insurance supervisory official of such jurisdiction informs the commissioner that such form is not subject to approval or disapproval by such official, and upon the commissioner's order requiring the form to be submitted to him for the purpose. The applicable standards shall apply to such forms as apply to forms for domestic use.

**56-2411 Grounds for disapproval of forms**

The commissioner shall disapprove any such form filed under section 56-2410, or withdraw any previous approval thereof only:

(1) If it is in any respect in violation of or does not comply with this Title;

(2) If it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract;

(3) If it has any title, heading, or other indication of its provisions which is misleading;



(4) If it is printed or otherwise reproduced in such manner as to render any provision of the form substantially illegible or not easily legible to persons of normal vision; or

(5) If it contains provisions which are unfair or inequitable or contrary to the public policy of this State, or would, because such provisions are unclear or deceptively worded, encourage misrepresentation.

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**56-2413 Contents of policies in general**

(1) The written instrument in which a contract of insurance is set forth is the policy.

(2) Every policy shall specify:

(a) The names of the parties to the contract;

(b) The subject of the insurance;

(c) The risks insured against;

(d) The time when the insurance thereunder takes effect and the period during which the insurance is to continue;

(e) The premium; and

(f) The conditions pertaining to the insurance.

(3) If under the policy the exact amount of premium is determinable only at stated intervals or termination of the contract, a statement of the basis and rates upon which the premium is to be determined and paid shall be included.

(4) Subsections (2) and (3) of this section shall not apply as to surety contracts, or to group insurance policies.

(5) All policies and annuity contracts issued by domestic insurers, and the forms thereof filed with the commissioner, shall have printed thereon an appropriate designating letter or figure, or combination of letters or figures or terms identifying the respective forms of policies or con-

tracts. Whenever any change is made in any such form, the designating letters, figures or terms thereon shall be correspondingly changed.

(6) All policies and annuity contracts shall contain such standard or uniform provisions as are required by the applicable provisions of this Title pertaining to contracts of particular kinds of insurance.



## APPENDIX N

### Georgia Insurance Code Chapter 56-30
### Ga. Code Ann. §§ 56-3001-3018

CHAPTER 56-30. INDIVIDUAL ACCIDENT AND SICKNESS INSURANCE

**56-3001 Definition of accident and sickness insurance policy**

The term "accident and sickness policy" as used in this Chapter includes any policy insuring against loss resulting from sickness, or from bodily injury or death by accident, or both, or any contract to furnish ambulance service in the future. Nothing in this Chapter shall apply to or affect:

(1) Any policy of workmen's compensation insurance or any policy of workmen's insurance or any policy of liability insurance with or without supplementary expense coverage thereon; or

(2) Any policy or contract of reinsurance; or

(3) Any policy, the renewal of which is subject to continuation of employment with a specified employer, or any blanket or group policy of insurance, or any policy issued pursuant to the exercise of conversion privileges provided for in group insurance policies; or

(4) Life insurance, endowment or annuity contracts, or contracts supplemental thereto which contain only such provisions relating to accident and sickness insurance as: (a) provide additional benefits in case of death or dismemberment or loss of sight by accident; or as (b) operate to safeguard such contracts against lapse, or to give a special surrender value or special benefit or an annuity in the event that the insured or annuitant shall become totally and permanently disabled, as defined by the contract or supplemental contract; or

(5) Companies, organizations or associations provided for in Chapters 56-17 and 56-18; or to any policy of acci-

dent, sickness or hospitalization insurance issued prior to the effective date of this Act.

**56-3002 Scope and format of policy**

No policy of accident and sickness insurance shall be delivered or issued for delivery in this State unless it meets the following requirements:

(1) The entire money and other considerations therefor are expressed therein;

(2) The time at which the insurance takes effect and terminates is expressed therein;

(3) It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment upon the application of an adult member of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed 19 years and any other person dependent upon the policyholder;

(4) The style, arrangement and over-all appearance of the policy given no undue prominence to any portion of the text, and every printed portion of the text of the policy and of any endorsements or attached papers is plainly printed in light-faced type of a style in general use, the size of which shall be uniform and not less than 10 point with a lower case unspaced alphabet length not less than 120 point (the "text" shall include all printed matter except the name and address of the insurer, name or title of the policy, the brief description, if any, and captions and subcaptions), when a policy is renewable only at the option of the insurer, such fact shall be made known in prominent lettering on the face of the policy.

(5) The exceptions and reductions of indemnity are set forth in the policy and, except those which are set forth in



sections 56-3004 and 56-3005, are printed, at the insurer's option, either included with the benefit provisions to which they apply, or under an appropriate caption such as "exceptions," or "exceptions and reductions": Provided, that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies;

(6) Each such form, including riders and endorsements, shall be identified by a form number in the lower left-hand corner of the first page thereof; and

(7) It contains no provision purporting to make any portion of the charter, rules, constitution, or bylaws of the insurer a part of the policy unless such portion is set forth in full in the policy, except in the case of the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the commissioner.

**56-3003 Age limit**

If any accident and sickness policy delivered or issued for delivery in this State contains a provision establishing as an age limit or otherwise, a date after which the coverage provided by the policy will not be effective, and if such date falls within a period for which premium is accepted by the insurer or if the insurer accepts a premium after such date, the coverage provided by the policy will continue in force until the end of the period for which premium has been accepted. In the event the age of the insured has been misstated and if, according to the correct age of the insured, the coverage provided by the policy would not have become effective, or would have ceased prior to the acceptance of such premium or premiums, then the liability of the insurer shall be limited to the refund, upon request, of all premiums paid for the period not covered by the policy.

**56-3004 Required policy provisions**

Each accident and sickness policy delivered or issued for delivery in this State shall contain the provisions specified in this section in the words in which the same appear in this section, except that the insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Such provisions shall be preceded individually by the caption appearing in this section, or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve. If any such provision is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy, the insurer, with the approval of the commissioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of a provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

(1) Entire contract; changes. This policy including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

(2) Time limit on certain defenses. (a) After two years from the date of issue of this policy no misstatements made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two year period.

(The foregoing policy provision shall not be so construed as to affect any legal requirements for avoidance of a pol-



icy or denial of a claim during such initial two year period, nor to limit the application of subsections (1), (2), (3), (4) and (5) of section 56-3005 in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insurer has the right to continue in force subject to its terms by the timely payment of premium: (i) until at least 60; or (ii) in the case of a policy issued after age 54, for at least five years from its date of issue, may contain in lieu of the foregoing the following provision (from which the clause in brackets may be omitted at the insurer's option) under the caption "incontestable":

After this policy has been in force for a period of two years during the lifetime of the insured [excluding any period during which the insured is disabled] it shall become incontestable as to the statements contained in the application.)

(b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

(3) Grace period. A grace period of ——— days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force. The insurer shall insert in the blank space a number not less than "7" for weekly premium policies, "10" for monthly premium policies and "30" for all other policies. A policy in which the insurer reserves the right to refuse renewal shall have at the beginning of the above provision: "unless not less than thirty (30) days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown

by the records of the insurer written notice of his intention not to renew this policy beyond the period for which the premium has been accepted . . ."

(4) Reinstatement. If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of any premium by the insurer or by any agent duly authorized by the insurer to accept such permium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy: Provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer, or lacking such approval, upon the 45th day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than 60 days prior to the date of reinstatement.

The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums (i) until at least age 60, or (ii) in the case of a policy issued after age 54, for at least five years from its date of issue.



(5) Notice of claim. Written notice of claim must be given to the insurer within 20 days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at ——— (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer.

In a policy providing a loss-of-time benefit which may be payable for at least two years, an insurer may at its option insert the following between the first and second sentences of the above provision:

"Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for at least two years, he shall at least once in every six months after having given notice of claim give to the insurer notice of continuance of said disability, except in the event of legal incapacity. The period of six months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which would otherwise have accrued during the period of six months preceding the date on which such notice is actually given."

(6) Claim forms. The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within 15 days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence,

the character and the extent of the loss for which claim is made.

(7) Proofs of loss. Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within 90 days after the termination of the period for which the insurer is liable and in case of claim for any other loss within 90 days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

(8) Time of payment of claims. Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid ——— (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.

(9) Payment of claim. Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provision respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured.



The following provisions, or either of them, may be included with the foregoing provisions at the option of the insurer.

If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such indemnity, up to an amount not exceeding $——— (insert an amount which shall not exceed $1,000) to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment.

Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing, medical services, may at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proof of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person.

(10) Physical examinations and autopsy. The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make autopsy in case of death where it is not forbidden by law.

(11) Legal action. No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

(12) Change of beneficiary. Unless the insured makes an irrevocable designation of beneficiary, the right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer's option.

**56-3005 Optional policy provisions**

No accident and sickness policy delivered or issued in this State shall contain provisions respecting the matters set forth in this section unless such provisions are in the words in which the same appear in this section, except that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the commissioner which is not less favorable in any respect to the insured or the beneficiary. Any such provision contained in the policy shall be preceded individually by the appropriate caption appearing in this section or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve. If any such provision is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy, the insurer, with the approval of the commissioner, shall omit from such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of a provision in such a manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.



(1) Change of occupation. If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, which ever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the State official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.

(2) Misstatement of age. If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age.

(3) Other insurance in this insurer. If an accident or sickness or accident and sickness policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for ——— (insert type of coverage or coverages) in excess

of $——— (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate.
or, in lieu thereof:

Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies.

(4) Insurance with other insurers. If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the "like amount" of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage.

If the foregoing policy provision is included in a policy which also contains the policy provision set out in subsection (5) of this section there shall be added to the caption of the foregoing provision the phrase "expense incurred benefits." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by orga-



nization subject to regulation by insurance law or by insurance authorities of this or any other State of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the commissioner. In the absence of such definition such term shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third party liability coverage shall be included as "other valid coverage."

(5) Insurance with other insurers. If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined.

If the foregoing policy provision is included in a policy which also contains the policy provision set out in subsection (4) of this section, there shall be added to the caption of the foregoing provision the phrase "other benefits."

The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance authorities of this or any other State of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third party liability coverage shall be included as "other valid coverage."

(6) Relation of earnings to insurance. If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not



operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of $200 or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time.

The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums; (i) until at least age 60 or; (ii) in the case of a policy issued after age 54, for at least five years from its date of issue. The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other State of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.

(7) Unpaid premium. Upon the payment of a claim under this policy, any premiums then due and unpaid or covered by any note or written order may be deducted therefrom.

(8) Return of premium on cancellation. If the insured cancels this policy, the earned premium shall be computed by the use of the short-rate table last filed with the state official having supervision of insurance in the state where the insured resided when the policy was issued. Cancellation shall be without prejudice to any claim originating prior to the effective date of cancellation.

(9) Conformity with state statutes. Any provision of this policy which, on its effective date, is in conflict with the statutes of the state, District of Columbia or territory in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

(10) Illegal occupation. The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation.

(11) Intoxicants and narcotics. The insurer shall not be liable for any loss sustained or contracted in consequence of the insured being intoxicated or under the influence of any narcotic unless administered on the advice of a physician.

(12) Cancellation of travel accident policies. As respects only travel accident insurance policies the following optional provisions may be inserted in the policy: "The insurer reserves the right to cancel this policy under the provisions set forth in section 56-2430 of the Georgia Insurance Code."

**56-3006 Renewability**

Each policy, covered by this Chapter, except accident insurance only policies, in which the insurer reserves the right to refuse renewal on an individual basis shall provide, the substance, in a provision thereof (entitled "renewability"), that subject to the right to terminate the policy upon nonpayment of premiums when due, such right to refuse renewal shall not be exercised before the renewal date occurring on, or after and nearest, each anniversary, or in the case of lapse and reinstatement at the renewal date occurring on, or after and nearest, each anniversary of the last reinstatement, and that any refusal or renewal



shall be without prejudice to any claim originating while the policy is in force. The insurer shall not amend or endorse the policy prior to the anniversary date in a manner tending to restrict or lower the benefits, add exclusions, or increase the premium.

**56-3007 Refund upon examination**

Every individual accident and sickness policy or contract, except single premium nonrenewable policies or contracts, issued for delivery in this State on or after the effective date of this Act by an insurer shall have printed thereon or attached thereto a notice stating in substance that the person to whom the policy or contract is issued shall be permitted to return the policy or contract within 10 days of its delivery to said purchaser and to have the premium paid refunded if, after examination of the policy or contract, the purchaser is not satisfied with it for any reason. If the insured or purchaser pursuant to such notice, returns the policy or contract to the insurer at its home or branch office or to the agent through whom it was purchased, it shall be void from the beginning and the parties shall be in the same position as if no policy or contract had been issued.

**56-3008 Outline of coverage**

Every insurer shall furnish to any applicant for accident and sickness insurance in this State a written outline showing the major coverage of the policy applied for, the major exclusions of the policy applied for, the renewal provisions of the policy applied for, and a reference to the policy as respects further provisions. Such written outline shall be given to the applicant at the time of signing the application for such policy and the forms of such outlines shall be subject to the same requirements for filing and approval as are set forth for the filing and approval of policy forms as required in sections 56-2410 and 56-2411.

**56-3009 Renewal premiums**

(a) Except as provided below, every insurer delivering or issuing for delivery in this State policies of accident and sickness insurance which are renewable at the option of the insurer or cancellable at the option of the insurer shall provide in said policies a provision as follows: If the company cancels or refuses to renew this policy except for nonpayment of premiums prior to age (insert age which shall not be less than 60), it will refund 75 per cent. of the premiums paid in excess of the benefits received. The requirements of this provision shall not apply to cancellation or refusal to accept renewal premiums because of change in occupation of the insured to an occupation generally classified by the insurer as to all applicants as uninsurable.

(b) This section shall not apply to, and the provisions quoted in the preceding paragraph need not be included in any major medical policy which provides that the insurer may cancel or refuse to renew the policy as of an anniversary date when also cancelling or refusing to renew all policies with the same provisions and premium rate basis in the jurisdiction in which the insured resides and then only if either or both of the following conditions are applicable:

(1) the insured is or could be covered by benefits, substantially similar in both kind and amount to those of the policy, in accordance with any Federal or State governmental health insurance program, or

(2) the insurer is prevented by any law or any regulation or ruling of a governmental agency from applying to the policy a table of premium rates which the insurer certifies, based on its experience, is reasonable in relation to the benefits provided.

For the purpose of this section, a major medical policy is any policy which provides benefits of at least 75 per



cent. of necessary, reasonable and customary charges for medical care including hospitalization in semi-private accommodations, with maximum lifetime benefit of at least $100,000, subject only to such exceptions, restrictions, limitations and deductibles as the commissioner may deem reasonable.

**56-3010 Reference to noncancellable nature or renewability option**

No policy of accident or sickness insurance shall refer to its noncancellable nature without at the same time disclosing all options the insurer may have in regard to renewability, and the guaranteed renewable nature of any such policy shall not be referred to unless the reference at the same time discloses the qualifications on the guarantee of renewability (including any age limits, any right to change premium rates by class, any aggregate provisions, and any other limitations on the right to renewal) in a manner which shall not minimize or render obscure the qualifying conditions.

**56-3011 Order of certain provisions**

The provisions which are the subject of sections 56-3004 and 56-3005 or any corresponding provisions which are used in lieu thereof in accordance with such sections, shall be printed in consecutive order of the provisions in such sections or, at the option of the insurer, any such provisions may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

**56-3012 Third party ownership**

The word "insured" as used in this Chapter, shall not be construed as preventing a person other than the insured

with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such policy to any indemnities, benefits and rights provided therein.

**56-3013 Requirements of other jurisdictions**

(1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this State, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of this Chapter and which is prescribed or required by the law of the state under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

**56-3014 Conforming to statute**

(1) No policy provision which is not subject to this Chapter shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to this Chapter.

(2) A policy delivered or issued for delivery to any person in this State in violation of this Chapter shall be held valid but shall be construed as provided in this Chapter. When any provision in a policy subject to this Chapter is in conflict with any provision of this Chapter, the rights, duties, and obligations of the insurer, the insured and the beneficiary shall be governed by the provisions of this Chapter.

**56-3015 Exemption of individual accident and sickness insurance proceeds from creditors**

The proceeds or avails of all accident and sickness policies and of provisions providing benefits on account of the



insured's disability which are supplemental to life insurance or annuity contract, except credit accident and sickness and credit life policies, shall be exempt from all liability for any debt of the insured, and from any debt of the beneficiary existing at the time the proceeds are made available for his use. The exemption of income benefits payable as the result of disability shall not exceed an average of $250 of such benefits per month of the period of disability.

**56-3016 Medical or surgical policies**

The benefits on account of medical or surgical services provided by an individual policy of accident and sickness insurance issued after the effective date of this Act may be limited by its terms to services performed by specifically defined professions: Provided, that in the absence of such definitions the term "physician" or "surgeon," as used in such a policy shall not be deemed limited solely to medical practitioners licensed under Code Chapter 84-9. When an individual policy of accident and sickness insurance, except policies providing special coverage for limited diseases, accident protection only or dental policies, provides for hospital care, there may be included within the scope of coverage (1) hospital care rendered on account of mental illnesses and (2) hospital care when rendered by any psychiatric hospital duly licensed by the State of Georgia. If such coverage is not included in the policy, a statement that the policy does not cover mental illnesses shall be (1) printed in the policy in bold-type or stamped on the face of the policy and (2) printed or stamped on any identification card issued pursuant to any such policy.

Any other laws to the contrary notwithstanding, whenever the term "physician" or "surgeon" is used in any policy of health or accident insurance issued in this State or in any contract for the provision of health care, services,

or benefits issued by any health, medical or other service corporation existing under, and by virtue of, any laws of this State, said term shall include, within its meaning, medical practitioners licensed under and in accordance with Code Chapter 84-7, relating to dentists, as now or hereafter amended, in respect to any care, services, procedures or benefits covered by said policy of insurance or health care contract which the said persons are licensed to perform, any provisions in any such policy of insurance or health care contract to the contrary notwithstanding. This paragraph shall be applicable to all policies in this State, regardless of date of issue, on the effective date of this paragraph.

**56-3017 Compliance by rider or indorsement**

The requirements of this Chapter may be complied with by the insurer, by attaching to the policy such rider or indorsement as may be necessary for the purpose.

**56-3018 Franchise accident and sickness insurance**

Accident and sickness insurance on a franchise plan is hereby declared to be that form of accident and sickness insurance issued to:

(1) Four or more employees of any corporation, copartnership, or individual employer or any governmental corporation, agency or department thereof; or

(2) Ten or more members, employees or employees of members of any trade or professional association or of a labor union or of any other association having had an active existence for at least two years where such association or union has a constitution or bylaws and is formed in good faith for purposes other than that of obtaining insurance; where such persons, with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons under an arrangement whereby the premiums



on such policies may be paid to the insurer periodically by the employer, with or without payroll deductions, or by the association or union for its members, or by some designated person acting on behalf of such employee or association or union. The term "employees" as used herein shall be deemed to include the officers, managers and employees and retired employees of the employer and the individual proprietor or partners if the employer is an individual proprietor or partnership.

## APPENDIX O

*Effective July 1, 1973*

### Regulations of the Georgia Insurance Commissioner Governing the Advertising of Accident and Sickness Insurance Chapter 120-2-12

**120-2-12-.01 Statutory Authority**

This Regulation is made and promulgated by the undersigned Insurance Commissioner pursuant to the authority set forth in Section 56-216 of the Insurance Laws of this State, and especially Chapter 56-7 of the Georgia Insurance Code.

**120-2-12-.02 Purpose**

The purpose of this Regulation is:

1. To implement the Insurance Laws of the State of Georgia with respect to advertising and sale of Accident and Sickness Insurance in this State, as defined in Section 56-404 of the Georgia Insurance Laws, and included in Section 56-408.

2. To protect the interests of the Accident and Sickness Insurance Public of this State by:

(a) The establishment of minimum standards of conduct to be observed by advertisers and sellers of Accident and Sickness Insurance;

(b) Requiring truthful, complete, clear and accurate disclosure of all material and relevant information in the advertising and sale of accident and sickness insurance so that members of the insurance public can adequately make a decision in their own best interest.

3. To prevent the use of unfair methods of competition and unfair practices among insurers with regard to the advertising, promotion and sale of accident and sickness insurance in this State.

**120-2-12-.03 Applicability**

These Rules shall apply to any accident and sickness insurance "advertisement" as that term is hereinafter defined, intended for presentation, distribution or dissemination in this State when such presentation, distribution or dissemination is made either directly or indirectly by or on behalf of an insurer, agent, broker, or solicitor as those terms are defined in the Insurance Code of this State and these Rules.

**120-2-12-.04 Definitions**

1. *Advertisement,* for the purpose of these Rules, shall include:

(a) Printed and published material, audio visual material, and descriptive literature of an insurer used in direct mail, newspapers, magazines, radio scripts, TV scripts, billboards and similar displays; and

(b) descriptive literature and sales aids of all kinds issued by an insurer, agent, solicitor or broker for presentation to members of the insurance buying public, including but not limited to, circulars, leaflets, booklets, depictions, illustrations, and form letters; and

(c) prepared sales talks, presentations, and material for use by insurers, agents, brokers and solicitors.

Advertisements of insurers for the sole purpose of obtaining employees, agents, agencies or brokers are among those not to be considered within the definition of an advertisement.

2. *Policy,* for the purpose of these Rules, shall include any Policy, Plan, Certificate, Contract, Agreement, Outline of Coverage, Rider, or Endorsement which provides accident or sickness benefits or medical, surgical or hospital expense benefits; whether on an indemnity, reimbursement, service, or prepaid basis, except when issued in connection with another kind of insurance other than life, and except disability, waiver of premium, and double indemnity benefits included in life insurance and annuity contracts.



3. *Insurer,* for the purpose of these Rules, shall include any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds, fraternal benefit society, and any other legal entity defined as an "insurer" in the Insurance Code of this State, which is engaged in, or responsible for, the advertisement of a policy as herein defined.

4. *Exception,* for the purposes of these Rules, shall mean any provision in a policy whereby coverage for a specified hazard is entirely eliminated; it is a statement of a risk not assumed under the policy.

5. *Exclusion,* for the purpose of these Rules, shall be construed to mean the same as "Exception", as defined herein in Rule 120-2-12-.04(4).

6. *Reduction,* for the purpose of these Rules, shall mean any provision which reduces the amount of the benefit to be received, or the period of time in which such benefits would be payable.

7. *Limitation,* for the purpose of these Rules, shall mean any provision which restricts coverage under the policy, other than an "Exception" or a "Reduction" as defined herein.

**120-2-12-.05 Form and Content of Advertisements**

1. The format and content of an advertisement of an accident or sickness insurance policy shall be accurate and shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether an advertisement has a capacity or tendency to mislead or deceive shall be determined by the Insurance Commissioner from the overall impression that the advertisement may

be reasonably expected to create upon a person of average education or intelligence, within the segment of the public to which it is directed, or within a segment of the public to which such advertisement may be reasonably calculated to reach.

2. Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases, the meaning of which is clear only by implication or by familiarity with insurance terminology, shall not be used.

3. The advertising of hospital or medical policies or plans shall clearly and accurately state the dollar limits of benefits where applicable, and time limits of benefits where applicable, in lieu of, or in conjunction with descriptive words which might imply "full coverage" for all expenses normally related to hospitalization or medical care.

4. An advertisement for a policy providing benefits for specified illnesses only, such as cancer, or for specified accidents only, such as automobile accidents, shall clearly and conspicuously in prominent type state the limited nature of the policy. The statement shall be worded in language identical to, or substantially similar to the following: "THIS IS A LIMITED POLICY"; "THIS IS A CANCER ONLY POLICY"; "THIS IS AN AUTOMOBILE ACCIDENT ONLY POLICY".

5. If a policy provides different benefits as to amount or time for the same loss occurring under different circumstances or from different causes, the smaller benefits payable shall be given the same prominence as the larger benefits.

6. All policies advertised shall be correctly identified by names reasonably calculated to describe their contents. FOR EXAMPLE: Hospital and Surgical Expense Policy; Hospital Income Policy; Hospital Confinement Policy; Disability Income Policy; Senior Citizen Hospital Expense Policy; Medical Care Accident and Health Policy; . . . etc.



The use of such terms as "Pay Check Plan"; "Hospital Dollars"; "Extra-income Plan"; "Extra Cash Plan"; "Extra Pay Plan"; "Hard Cash Plan"; "White Cross Plan"; "Doctors' Plan"; or similar words or phrases which do not correctly identify the policy, shall be prohibited.

In addition, all advertised policies must be identified by Form Number.

7. Any Optional Benefit advertised shall be captioned as "Optional Benefits" and shall be prominently and conspicuously displayed in immediate conjunction with the conditions to qualify for such Optional Benefits. And advertisement must contain a statement that in order to obtain such optional benefits there will be an additional premium charged for each optional benefit desired. A statement must also be included in the advertisement as to what conditions, if any, must be met to qualify for such benefits.

8. All advertisements of accident and sickness insurance in this State shall include the name, address and phone number of the Home or Principal Office and/or of the nearest representative or representatives of the insurer authorized to handle claims and to provide service and information to applicants and/or insureds.

9. Any advertisement making reference to "Medicare Supplement Insurance" or to coverage designed to supplement "Medicare", shall contain a clear, prominent and conspicuous statement in language identical to or substantially the same as the following: "THIS IS A LIMITED POLICY DESIGNED TO COVER ONLY THOSE EXPENSES WHICH MEDICARE DOES NOT COVER". Furthermore, such advertisements must clearly, prominently and conspicuously disclose the exact benefits payable under such advertised policy.

If such advertised Medicare Supplement Policy supplements only Medicare Part A (or hospital benefits only), this shall be clearly, prominently and conspicuously dis-

played in the advertisement; nor shall such advertisements use the maximum amount payable without giving an exact example of the conditions which must be met in order for a policyholder to collect the maximum amount.

10. Any advertisement which refers to maximum dollar amount of benefits which can be paid for any period greater than one day shall disclose at the same time, in an equally prominent, frequent, and conspicuous manner, and in immediate conjunction therewith, the daily rate of benefits, and when applicable, the fact that said benefits are payable only for the actual number of days of hospital confinement and, when applicable, the limit on the number of days for which coverage is provided.

11. Words and phrases used in an advertisement to describe policy limitations, exceptions, and reductions shall fairly, accurately, and clearly describe in understandable terms the negative features of such limitations, exceptions and reductions of the policy.

**120-2-12-.06 Deceptive Words, Phrases, or Illustrations Prohibited**

1. No advertisement shall omit information or use words, phrases, statements, references or illustrations if the omission of such information or use of such words, phrases, statements, references or illustrations has the capacity, tendency or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy benefit payable, loss covered or premium payable. The fact that the policy offered is made available to a prospective insured for inspection prior to consummation of the sale, and/or offer is made to refund the premium if the purchaser is not satisfied, does not remedy misleading statements.

2. No advertisement shall state or imply that all costs of hospitalization or medical expense will be paid, or that all income will be replaced by benefits, unless the policy is without limitation or restriction in any form. No advertisement shall contain or use words or phrases such as: "all"; "full"; "complete"; "comprehensive"; "liberal"; "unlimited"; "as high as"; "fills all gaps"; "full coverage"; "complete protection"; "all coverage"; "deductibles covered"; "this policy will help pay your hospital and surgical bill"; "this policy will help fill some of the gaps that Medicare and your present insurance leave out"; "this policy will help to replace your income" (when used to express loss of time benefits); "salary replacement"; "wage continuation"; or similar words and phrases, to imply generosity or liberality or in a manner which exaggerates any benefits beyond the terms of the policy.



3. No advertisement shall contain descriptions of a policy limitation, exception, or reduction worded in a positive manner to imply that it is a benefit, such as: describing a waiting period as a "benefit builder", or stating "even pre-existing conditions are covered after two years".

4. No advertisement shall contain or use identifying terms, words, or phrases which do not correctly identify the policy. (See Rule 120-2-12-.05(6).)

5. No advertisement of a benefit for which payment is conditional upon the incurrence of any medical expenses shall use words or phrases such as "tax free"; "extra cash"; "extra income"; "extra pay"; or substantially similar words or phrases that might have the capacity, tendency or effect of misleading the public into believing that the policy advertised will, in some way, enable them to make a profit from any illness, injury, condition, or confinement in a hospital or similar facility.

6. No advertisement of a hospital or other similar facility confinement benefit shall advertise that the amount of benefit is payable on a monthly or weekly basis when, in fact, the amount of the benefit payable is based upon a daily pro rata basis relating to the number of days of actual confinement.

7. No advertisement of a policy covering only one disease or list of specified diseases shall imply coverage beyond the terms of the policy. Synonymous terms shall not be used to refer to any disease so as to imply broader coverage than is the fact.

8. An advertisement or a direct response insurance product shall not state or imply that because "no insurance agent will call and no commissions will be paid to agents", that it is a "low cost plan", or use other similar words or phrases.

9. No advertisement shall contain or use any statement relating to time within which claims are paid (within 24 to 48 hours, etc.), unless the policy being advertised actually requires and guarantees payment within such designated period.

10. No adveritsement shall imply that a company frequently and routinely pays specified sums for any type of accident or sickness when, in fact, only certain specified accidents or illnesses are covered.

**120-2-12-.07 Exceptions, Reductions and Limitations**

1. Exceptions, reductions and limitations shall be prominently and conspicuously displayed in the same style type and in a type size equal to, or larger than, that used to describe the benefits. Furthermore, a multi-color scheme shall not be used in such a manner as to render such terms obscure.

2. Any advertisement which refers to either a dollar amount, or a period of time for which any benefit is payable, or the cost of the policy, or specific policy benefit, or the loss for which such benefit is payable, shall also disclose those exceptions, reductions and limitations affecting the basic provisions of the policy without which the advertisement would have the capacity or tendency to mislead or deceive.



3. When a policy contains a waiting, elimination, probationary or similar time period between the effective date of the policy and the effective date of coverage under the policy or a time period between the date a loss occurs and the date benefits begin to accrue for such loss, an advertisement which is subject to the requirements of the preceding paragraph shall clearly, prominently and conspicuously disclose the existence of such periods.

4. An advertisement shall not use the words "only"; "just"; "merely"; "minimum"; or similar words or phrases to describe the applicability of any exceptions and reductions, such as: "This policy is subject to the following minimum exceptions and reductions".

**120-2-12-.08 Pre-Existing Conditions**

1. An advertisement which is subject to the requirements of these Rules shall, in negative terms, clearly, prominently and conspicuously disclose the extent to which any loss is not covered if the cause of such loss is traceable to a physical condition, injury or disease existing before issuance of the policy. If the term "pre-existing condition", or similar words or phrases are used in an advertisement, they must be accompanied by an appropriate definition or description which states exactly what conditions are included as "pre-existing conditions" for the purposes of the policy.

2. When a policy does not cover losses resulting from pre-existing conditions, no advertisement of the policy shall state or imply that the applicant's physical condition or medical history will not affect the issuance of the policy or payment of a claim thereunder. This rule prohibits the use of the phrase "no medical examination required", and phrases of similar import, but does not prohibit explaining "automatic issue".

3. If an insurer requires a medical examination for a specified policy, the advertisement shall prominently disclose that a medical examination is required.

4. In the event any advertisement contains an application form to be completed by the applicant and returned by mail for a direct response insurance product, such application form shall contain a question which reflects the pre-existing condition provisions of the policy, immediately preceding the blank space for the applicant's signature. For example, such an application form must contain a question identical to or substantially similar to the following: "Do you understand that this policy will not pay benefits during the first —— year(s) after the issue date for a disease or physical condition which you now have, or have had in the past?

☐ I do understand ☐ I do not understand."

No policy shall be issued unless the question is answered affirmatively.

**120-2-12-.09 Necessity for Disclosure of Policy Provisions Relating to Renewability, Cancellability and Termination**

1. Any advertisement of a policy or plan of benefits contained therein must not imply that the policy or plan is guaranteed renewable at the discretion of the insured unless the renewability of such policy or plan of benefits is, in fact, guaranteed.

2. Any advertisement which refers to:

(a) dollar amounts,

(b) periods of time for which any benefit is payable,

(c) costs of the policy,

(d) specific policy benefits,

(e) loss or losses for which benefits are payable,

(f) time or age limitations,

(g) or any other limiting or qualifying conditions in connection with eligibility of applicants or continuation of the policy, renewability, cancellability or termination, shall



clearly, prominently and conspicuously disclose said provisions and any modification, cancellation or termination of benefits, of losses covered, or of premiums, which may occur (because of age or for other reasons), in a manner which shall not minimize or render obscure the qualifying conditions.

**120-2-12-.10 Testimonials or Endorsements by Third Parties**

1. Testimonials used in advertisements must be genuine, represent the current opinion of the author, be applicable to the policy advertised, and be accurately reproduced. The insurer, in using a testimonial, makes as its own all of the statements contained therein, and the advertisement, including such statement, is subject to all the provisions of these Rules.

2. If the person making a testimonial, an endorsement, or an appraisal has a financial interest in the insurer or a related entity as a stockholder, director, officer, employee, or otherwise, such fact shall be prominently disclosed in the advertisement.

3. If a person is compensated for making a testimonial, endorsement or appraisal, such fact shall be prominently disclosed in the advertisement by language identical to, or substantially similar to the following: "THIS IS A PAID ENDORSEMENT". (This Rule does not require disclosure of union scale wages required by union rules if the payment is actually for such scale wages for TV or radio performances). For the purposes of these Rules, the payment of substantial amounts, directly or indirectly, to an endorser for "travel and entertainment" in connection with the filming or recording of TV or radio advertisements constitutes compensation, and disclosure of such compensation is required.

4. An advertisement shall not state or imply that an insurer or a policy has been approved or endorsed by any individual, group of individuals, society, association or

other organization, unless such is the fact; and unless any proprietary relationship between an organization and the insurer is clearly, prominently and conspicuously disclosed. If the entity making the endorsement or testimonial has been formed by the insurer, or is owned or controlled by the insurer, or the person or persons who own or control the insurer, such fact shall be disclosed in the advertisement.

5. When a testimonial refers to benefits received under a policy, the specific claim data, including claim number, date of loss, and other pertinent information shall be retained by the insurer for inspection for a period of four years, or until the filing of the next regular report of examination of the insurer, whichever is the longer period of time.

6. For the purposes of these Rules, with regard to testimonials and endorsements by third parties, "Endorser" shall mean any individual, group of individuals, society, association or organization that endorses, approves or recommends an insurer, a policy, or plan of benefits.

7. No such testimonial, endorsement or appraisal shall be made in any form which constitutes a solicitation of insurance in this State, unless such endorser is currently licensed in Georgia to solicit insurance.

**120-2-12-.11 Use of Statistics**

1. Any advertisement relating to the dollar amounts of claims paid, the number of persons insured, or similar statistical information relating to any insurer or policy, must not contain irrelevant facts and must not be used unless it accurately reflects all of the relevant facts. Furthermore, such advertisements must not contain irrelevant facts; nor shall it imply that statistics used therein are derived from the policy advertised unless such is the fact. When statistics used in an advertisement are applicable to other policies or plans, it shall specifically be so stated.



2. An advertisement shall not represent or imply that claim settlements by the insurer are "liberal" or "generous", or use words of similar import; or that claim settlements are or will be beyond the actual terms of the contract.

3. An unusual amount paid for a unique claim for the policy advertised is misleading and shall not be used.

4. The source of any statistics used in an advertisement must be clearly, prominently and conspicuously identified in the advertisement.

**120-2-12-.12 Identification of Plan or Number of Policies**

1. When a choice of the amount of benefits is referred to, an advertisement shall disclose that the amount of benefits provided depends upon the plan selected and that the premium will vary with the amount of the benefits selected.

2. An advertisement listing the benefits of two or more policies different in their content should identify each policy with the benefits which it offers. Group Master Policies are not included for the purposes of this Rule. In such cases, the advertisement shall disclose that these benefits are provided only through a combination of policies.

**120-2-12-.13 Disparaging Comparisons and Statements**

An advertisement shall not directly or indirectly make unfair or incomplete comparisons of policies or benefits, or comparisons of non-comparable policies of other insurers, and shall not disparage competitors, their policies, services, or business methods, and shall not disparage or unfairly criticize competing methods of marketing insurance.

**120-2-12-.14 Jurisdictional Licensing and Status of Insurer**

1. An advertisement which is intended to be seen or heard beyond the limits of the jurisdiction in which the insurer is licensed shall not imply licensing beyond those limits.

2. An advertisement shall not create the impression directly or indirectly that the insurer, its financial condition or status, or the payment of its claims, or the merits, desirability, or advisability of its policy forms or kinds or plans of insurance are approved, endorsed, or accredited by any division or agency of this State or the United States Government.

**120-2-12-.15 Identity of Insurer**

1. The name of the actual insurer advertised shall be properly identified and prominently, clearly and conspicuously displayed in all of its advertisements. An advertisement shall not refer to the parent company of the insurer without clearly disclosing that it is a separate legal entity and not responsible for the insurer's financial condition or contractual obligations.

2. An advertisement shall not include a trade name, an insurance group designation, or the name of any division, affiliate or subsidiary of the insurer, or any service mark, trade mark, slogan, symbol, or other device which has the capacity or tendency to deceive an individual as to the true identity of the insurer or the policy being advertised.

3. No advertisement shall use any combination of words, symbols, or physical materials which by their content, phraseology, shape, color, or other characteristics are so similar to combination of words, symbols, or physical materials used by agencies of the Federal Government, or of this State, or otherwise appear to be of such a nature that it tends to confuse or mislead prospective insureds into believing that the solicitation is in some manner connected with an agency of the municipal, State or Federal Government.

**120-2-12-.16 Group or Quasi-Group Implications**

An advertisement of a particular plan or policy of insurance shall not state or imply that prospective insureds



become "group" or "quasi-group" members covered under a group policy, and as such enjoy special rates or underwriting privileges, unless such is the fact.

**120-2-12-.17 Introductory, Initial or Special Offers**

1. (a) An advertisement of an individual policy shall not directly or by implication represent that a contract or combination of contracts is an introductory, initial, or special offer or that applicants will receive substantial advantages not available at a later date or that the offer is available only to a specified group of individuals, unless such is the fact.

(b) An advertisment shall not contain phrases describing an enrollment period as "special", "limited", or use similar words or phrases when the insurer uses such enrollment periods as the usual method of advertising accident and sickness insurance.

(c) An enrollment period during which a particular insurance product may be purchased on an individual basis shall not be offered within this State unless there has been a lapse of not less than six (6) months between the close of the immediately preceding enrollment period for the same product and the opening of the new enrollment period.

(d) The advertisement shall indicate the date by which the applicant must mail the application, which shall not be less than ten (10) days and not more than forty (40) days from the date that such enrollment period is advertised for the first time. This Rule applies to all advertising media; including, but not limited to: mail, newspapers, radio, television, magazines, periodicals, personal solicitations, and telephone solicitations.

(e) This Rule prohibits any statement or implication to the effect that only a specific number of policies will be sold, or that a time is fixed for the discontinuance of the sale of

the particular policy advertised because of special advantages available in the policy, unless such is the fact.

(f) This Rule prohibits the use of minor variations in the form or contents of a plan or policy in order to avoid or circumvent the provisions of paragraph (c) of this Rule. Mere variations of the terms of renewability, increases or decreases in the dollar amounts of benefits, or increases or decreases in any elimination or waiting period from those available during an enrollment period for another policy, shall not be sufficient to establish it as a new or different "particular insurance product" not subject to the provisions of paragraph (c).

2. An advertisement shall not offer a policy which utilizes a reduced initial premium rate in a manner which overemphasizes the availability and the amount of the initial reduced premium. When an insurer charges an initial premium that differs in amount from the amount of the renewal premium payable on the same mode, the advertisement shall not display the amount of the reduced initial premium either more frequently or more prominently than the renewal premium, and both the initial reduced premium and the renewal premium must be stated in juxtaposition in each portion of the advertisement where the initial reduced premium appears.

3. Special awards, such as a "safe drivers' award", or special classes such as "non-drinkers" or "non-smokers" shall not be used in connection with advertisements of accident or accident and sickness insurance, unless premiums are, in fact, reduced on the basis of statistical information showing reduced risk based on membership in such class. Such statistics shall be on file in the Home or Principal Office of the insurer.

**120-2-12-.18 Statements About an Insurer**

An advertisement shall not contain statements which are untrue in fact, or by implication misleading, with respect



to the assets, corporate structure, financial standing, age, or relative position of the insurer in the insurance business. An advertisement shall not contain a recommendation by any commercial rating system unless it clearly indicates the purpose of the recommendation and the limitations of the scope and extent of the recommendation.

**120-2-12-.19 Insurers' Responsibility and Control: Advertising File: Certificate of Compliance**

1. All advertisements, regardless of by whom written, created or designed, shall be the responsibility of the insurer sponsoring the same. Every insurer shall at all times maintain complete control over the content, form and method of dissemination of all advertisements of its contracts.

2. Each insurer shall maintain at its home or principal office a complete file containing every printed, published or prepared advertisement of individual policies and typical printed, published or prepared advertisements of blanket, franchise and group policies hereafter disseminated in this State, with a notation attached to each such advertisement which shall indicate the manner and extent of distribution and the form number of any policy advertised. Such file shall be subject to regular and periodic inspection at the discretion of this Department. All such advertisements shall be maintained in said file for a period of not less than five (5) years.

3. Each insurer required to file an Annual Statement with this Department must file, together with its Annual Statement, a Certificate executed by an authorized officer of the insurer wherein it is stated that to the best of his knowledge, information and belief, the advertisements disseminated by the insurer during the preceding calendar year complied, or were made to comply in all respects, with the provisions of the Insurance Laws of this State as implemented and interpreted by this Regulation.

**120-2-12-.20 Severability Provision**

If any Section or portion of a Section of this Regulation, or the applicability thereof to any person or circumstance is held invalid by a Court, the remainder of the Rules, or the applicability of such provision to other persons or circumstances, shall not be affected thereby.

**120-2-12-.21 Penalties**

Any insurer, agent, representative, officer, or employee of such insurer failing to comply with the requirements of this Regulation shall be subject to such penalties as may be appropriate under the Insurance Laws of the State of Georgia.

**120-2-12-.22 Effective Date**

This Regulation shall become effective July 1, 1973.



## APPENDIX P

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

January 2, 1979

Nos. 76-1956, 76-2675.

DOREEN M. COCHRAN, *Plaintiff-Appellant,*

v.

PACO, INC., *Defendant-Appellee.*

CLARA M. JONES, *Plaintiff-Appellant,*

v.

PACO, INC., *Defendant-Appellee.*

**Appeal from the United States District Court for the Northern District of Georgia**

• • • • • • • • • • •

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

These consolidated cases, along with two others also decided this day,[1] require us to examine the relationship between the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. §§ 1011 *et seq.*, and the Truth in Lending Act ("TIL"), 15 U.S.C. §§ 1601 *et seq.* Here we must decide whether the McCarran Act precludes application of TIL's disclosure requirements to a credit agreement between a lending institution and a borrower who had obtained the loan to purchase automobile insurance.

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[1] *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468 (5 Cir. 1978); *Cody v. Community Loan Corp.*, 606 F.2d 499 (5 Cir. 1978).

The district court, faced with the borrower's suit alleging violations of TIL, held that the lender was engaged in the business of insurance within the meaning of the McCarran Act and entered summary judgment in favor of the lender. For the reasons stated below, we reverse.

### I. Factual Background

Paco, Inc. is a premium finance company licensed by the Georgia Insurance Commissioner under the state's Insurance Premium Finance Company Act, Ga. Code Ann. §§ 84-5301 *et seq.* In March 1975, Doreen Cochran entered into a contract with Paco whereby Paco agreed to finance the premiums on an automobile insurance policy that Cochran purchased from Cotton States Mutual Insurance Company. This premium financing agreement contained disclosures[2] mandated by Georgia law, as well as others that are permissible but not required.[3] Paco took a security interest in the policy and was granted a power of attorney, enabling it to cancel the insurance if the installment payments were

[2] The following information was disclosed:

| | |
|---|---|
| Cash price (total premiums) | $151.00 |
| Cash down payment | $ 53.00 |
| Unpaid balance (amount financed) | $ 98.00 |
| Finance charge | $ 14.28 |
| Total of pmts. | $112.28 |
| Annual percentage rate | 67.96% |
| Deferred payment price | $165.28 |
| No. pmts. | 4 |
| Amount each payment | $ 28.07 |
| Date first payment due | 4-12-75 |

[3] Under Ga. Code Ann. § 84-5309, a premium financing agreement must contain the total premiums, the amount of the down payment, the principal balance, the amount of the service charge, the balance payable by the insured, the number of payments required, the amount of each payment in dollars, and the due date. The statute specifically provides that "additional items may be included," and here the agreement showed the "annual percentage rate."



not made. *See* Ga. Code Ann. § 84-5312(a). When Cochran defaulted, Paco cancelled the policy.

Cochran brought this action, alleging that Paco had violated the disclosure requirements of TIL and Regulation Z, 12 C.F.R. § 226.[4] Paco moved to dismiss on the basis of the McCarran Act and later moved for summary judgment. The case was referred to a special master, who recommended that Paco's motion be denied. However, the district judge rejected that recommendation and entered summary judgment in favor of Paco, holding that the lender was engaged in the business of insurance which is regulated by the State of Georgia and that application of TIL to the premium financing agreement would supersede Georgia law, in contravention of the McCarran Act. Cochran's subsequent motion to alter or amend this decision was denied. *Cochran v. Paco, Inc.*, 409 F.Supp. 219 (N.D.Ga.1976).

On the basis of this decision, Paco's motion to dismiss was granted in a similar case, *Jones v. Paco., Inc.*, No. C76-90A (N.D.GA., May 5, 1976). Appeals were taken in both cases, which were then consolidated. Because the facts in *Jones* are substantially the same as those in *Cochran,*

[4] Specifically, Cochran alleged that Paco failed to: (1) disclose using the appropriate term, the "unpaid balance of cash price," in violation of 12 C.F.R. § 226.8(c)(3); (2) disclose, using the appropriate term, the "total down payment," in violation of § 226.8(c)(2); (3) make the required disclosures clearly and in meaningful sequence, in violation of § 226.6(a); (4) print the term "finance charge" more conspicuously than other terminology, in violation of § 226.6(a); (5) disclose adequately default charges payable in the event of late payments in violation of § 226.8(b)(4); (6) adequately disclose the security interest it purports to hold, in violation of § 226.8(b)(5); (7) disclose the "total of payments," using that term, in violation of § 226.8(b)(3); (8) identify the method of computing any unearned portion of the finance charge in the event of prepayment, in violation of § 226.8(b)(7); and (9) furnish a duplicate of the disclosure statement at the time disclosures were made, in violation of § 226.8(a).
Record at 42, 72-73.

we will not recite them. The legal issues in the two cases are identical.[5]

### II. The McCarran-Ferguson Act

These cases call into play the first two sections of the Act, 15 U.S.C. §§ 1011 & 1012, which provide as follows:

> § 1011. Declaration of policy
>
> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the

[5] The Board of Governors of the Federal Reserve System, charged with the responsibility of prescribing regulations for the implementation of TIL, has filed an *amicus curiae* brief in *Cochran* urging reversal of the district court's decision.



> business of insurance to the extent that such business is not regulated by State law.

The legal climate surrounding the Act's passage was neatly summarized by Justice Marshall in *Securities & Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458, 89 S.Ct. 564, 567-68, 21 L.Ed.2d 668 (1969):

> [The Act] was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia,* 8 Wall. 168, 183, 19 L.Ed. 357 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters,* this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws in particular, were applicable to them. Congress reacted quickly. Even before the opinion was announced, the House had passed a bill exempting the insurance industry from the antitrust laws. 90 Cong.Rec. 6565 (1944). Objection in the Senate killed the bill, 90 Cong. Rec. 8054 (1944), but Congress clearly remained concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first section; Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U.S.C. § 1011. As this Court said shortly afterward, "[o]bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 429, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

Congress thus returned to the states the plenary power to regulate the business of insurance that they had enjoyed prior to the *South-Eastern Underwriters* decision.[6] If Congress intended to invoke its Commerce Clause powers to occupy part of the field of insurance regulation, it would expressly say so. Congress wanted to ensure that no future federal legislation enacted under the Commerce Clause and not specically related to insurance would be construed as an implied repeal of the McCarran Act. 15 U.S.C. § 1012 (b).[7]

Finally, although the Act was passed primarily in response to *South-Eastern Underwriters,* an antitrust case, there is no doubt that its scope is much broader than the antitrust area. For example, state tax laws relating to the business of insurance are expressly covered by 15 U.S.C. §§ 1011 & 1012. In addition, these two sections speak of "regulation" of the insurance business, and that term is certainly not limited to antitrust regulation. Although debate naturally focused for the most part on the Act's anti-

[6] This power was understood to be constitutionally limited by the states' inability to regulate outside their borders. *See FTC v. National Cas. Co.,* 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); 91 Cong.Rec. 487 (1945) (remarks of Senator Ellender).

[7] Senator Ferguson stated:

> If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because the Congress had not . . . said that the new law specifically applied to insurance.

91 Cong.Rec. 481 (1945). *See also id.* at 1487 (remarks of Senator Ferguson); *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. at 429-30, 66 S.Ct. 1142.



trust implications,[8] Congress was clearly concerned with the overall regulatory picture, including "collection of premiums, general regulations, the issuing of licenses, and many other aspects of the business." 91 Cong. Rec. 481-82 (1945) (remarks of Senator Radcliffe).[9] Moreover, 15 U.S.C. § 1014 makes the National Labor Relations Act and the Fair Labor Standards Act specifically applicable to the business of insurance, also demonstrating Congress' intent to leave the states free to regulate insurance in areas having no relationship to antitrust.

Not surprisingly, the bulk of McCarran Act jurisprudence involves the Act's application in the antitrust context. While the antitrust cases are not dispositive of the issues presented in the instant cases, they do serve as useful guides for construing the terms of the statute, and where appropriate we shall feel free to borrow prior constructions of the Act's language from the antitrust cases.

### III. Discussion

The initial question is whether TIL "specifically relates to the business of insurance" within the meaning of 15 U.S.C. § 1012(b). If it does, the McCarran Act defense is automatically defeated and our inquiry is at an end. If it does not, then we must decide whether Paco's premium financing activities, carried out in connection with Cochran's purchase of an insurance policy from another company, constitute the "business of insurance" for purposes of § 1012(b). If those activities are not a part of the business of insurance, TIL would apply. If they are a part of such business, we must then determine whether Georgia has "enacted by any [law] . . . for the purpose of regulating" such activities. If the state has not done so, TIL would apply. If it has, we must finally decide whether TIL would "invalidate, impair, or supersede" such state law. *See SEC*

[8] *See* 91 Cong.Rec. 1442-44, 1477-89 (1945).

[9] *See also* 91 Cong.Rec. 483 (remarks of Senators Radcliffe and Ferguson); 1480 (remarks of Senator Pepper).

*v. National Securities, Inc., supra; Lowe v. Aarco American, Inc.*, 536 F.2d 1160 (7 Cir. 1976); *Gerlach v. Allstate Ins. Co.*, 338 F.Supp. 642 (S.D.Fla.1972); Krischer, *"Truth" in Insurance Premium Financing*, 30 Bus.Lawyer 969 (1975).

*A. "Specifically Relates"*

Nowhere in TIL is there a provision that specifically relates the legislation to the business of insurance. In contrast, the McCarran Act itself contains a section that "specifically relates" the National Labor Relations Act and the Fair Labor Standards Act to the business of insurance. 15 U.S.C. § 1014.[10] Moreover, TIL contains no other indication that we should construe it as an implied repeal of the McCarran Act, even if we were so inclined as to ignore the Act's legislative history and judicially recognize such an implied repeal. *See* footnote 7, *supra*, & accompanying text.

Although TIL does not *exempt* insurance transactions from its coverage, 15 U.S.C. § 1603,[11] we cannot twist this

[10] 15 U.S.C. § 1014 provides:

> Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

[11] 15 U.S.C. § 1603 provides:

This subchapter does not apply to the following:

> (1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.
>
> (2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.
>
> (3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.



omission into an affirmative provision that "specifically relates" TIL to the business of insurance. Similarly, Congress' consideration of at least some aspects of the insurance business in the passage of TIL[12] is insufficient. An express application of a federal statute to the insurance business is required before TIL would automatically defeat a McCarran Act defense. We thus agree with the district court and others that TIL does not "specifically relate" to such business. *Cochran v. Paco, Inc., supra*, 409 F.Supp. at 224; *Ben v. General Motors Acceptance Corp.*, 374 F.Supp. 1199, 1201 (D.Colo.1974); *Gerlach v. Allstate Ins. Co., supra*, 338 F.Supp. at 649; *In re Providence Washington Ins. Co.*, 89 F.T.C. 345, 354 (1976); Krischer, *supra*, 30 Bus.Lawyer at 975.

*B. "Business of Insurance"*

Having concluded that TIL does not "specifically relate" to the business of insurance, we must now determine whether the district court properly concluded that Paco's premium financing in connection with Cochran's purchase of an automobile insurance policy from Cotton States constitutes the "business of insurance". The McCarran Act itself contains no definition of the "business of insurance," and the courts have not yet established the precise metes and bounds of the term. The Supreme Court provided

> (4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.
>
> (5) Credit transactions primarily for agricultural purposes in which the total amount to be financed exceeds $25,000.

[12] For example, 15 U.S.C. § 1605(a) defines "finance charge" as "the sum of all charges" imposed directly or indirectly "as an incident to the extension of credit, including any of the following types of charges which are applicable: * * * (5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss."

some guidance in *Securities and Exchange Commission v. National Securities, Inc., supra,* in which Justice Marshall wrote:

> The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies, *FTC v. National Casualty Co.,* 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. *Robertson v. People of State of California,* 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

393 U.S. at 459-60, 89 S.Ct. at 568-69.



In applying *National Securities,* we must keep in mind that Paco is not an insurance company.[13] In premium financing agreements such as the one between Paco and Cochran, Paco advances the premiums to the insurance company and Cochran, the insured, pays Paco in periodic installments. In case of default, Paco can exercise its power of attorney and cancel the policy. In this limited sense, Paco steps into the shoes of the insured and gives notice of cancellation to the insurance company and the insured, and upon such cancellation, both the insurance company and the premium finance company must credit unearned premiums to the insured. *See* Ga.Code Ann. §§ 84-5312, 84-5313. Thus, as the district court acknowledged, Paco is performing the same role in the "insurance business" as do other financing companies in the consumer sales business. 409 F.Supp. at

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[13] At the outset we reject Paco's argument that under *National Securities* the McCarran Act exemption extends to people who are neither the insurance company nor the insured. Paco points to the following language in the *National Securities* case:

> The [McCarran Act] did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance."

393 U.S. at 459, 89 S.Ct. at 568 (emphasis original). The Seventh Circuit accepted this contention in *Lowe v. Aarco-American, Inc., supra,* but we reject it, finding the analysis of the administrative law judge in *In re Providence Washington Ins. Co., supra,* more persuasive. There the judge said:

> [T]he language relied on by respondents did not purport to expand the "business of insurance" concept beyond the activities of insurance companies, but limited that concept to recognize that not all activities of insurance companies constitute the "business of insurance."

89 F.T.C. at 358. The full text of the Supreme Court's analysis in *National Securities,* set out above, makes this obvious. It is noteworthy that the Court in the same paragraph mentioned "insurer" or "insurance company" in five subsequent sentences.

221. *See generally* Comment, *Insurance Premium Financing,* 19 Buff.L.Rev. 656 (1970).

Beyond the *National Securities* case, there is precious little judicial authority to aid us. The only appellate decision touching the issue is *Lowe v. Aarco-American, Inc., supra.* Relying on *National Securities* and *Gerlach v. Allstate Ins. Co., supra,* the court held that the credit sale of insurance policies by an insurance broker and a premium finance company was part of the business of insurance and that the transaction was thus outside the purview of TIL. The court also held that since the relevant activities were regulated extensively by the Illinois Insurance Code and the state's Premium Financing Companies Act, application of TIL would supersede Illinois law. Interestingly, there was no inconsistency between the disclosure provisions of TIL and the applicable Illinois requirements. 536 F.2d at 1162.

In *Gerlach* the plaintiff had purchased an Allstate automobile insurance policy on terms—10% down, balance in 10 installments with a flat 50¢ service fee per installment. Premium financing was not involved, since the plaintiff was not contractually obligated to pay the premiums; the single consequence of default was cancellation of the policy. The court held that Allstate's activities with respect to its premium payment plan and service charge were part of its rate structure and thus subject to regulation by the state of Florida. However, in rather sweeping dictum the court also stated that a premium financing arrangement would also have constituted the business of insurance and would have thus precluded application of TIL. 338 F.Supp. at 650. The *Lowe* court relied on this dictum.

We decline to follow these decisions, which contain no reasoned discussion of the *National Securities* standard and which, in our view, misconstrues the test. Under *National Securities,* the key factor is the relationship between the insurer and the insured, and statutes "aimed at protecting



or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance.' " 393 U.S. at 460, 89 S.Ct. at 568-69. In explaining that relationship, the Court focused on "the type of policy which could be issued, [and] its reliability, interpretation, and enforcement." *Id.* at 459, 89 S.Ct. at 568.

We fail to see how these elements in the insurer-insured relationship are affected to any significant extent by premium financing arrangements. Premium financing has little —if any—effect on an insurance company's ability to pay claims or on the nature of the policies it issues. Further, the activity could affect a policy's enforceability only in terms of whether the policy was in effect at a particular time, a question that might arise in the event of a payment error. Such a dispute, however, does not concern the details of the policy, its terms, or its coverage. We thus agree with the administrative law judge in *In re Providence Washington Ins. Co., supra,* a case in which a premium finance company—a wholly owned subsidiary of an insurance company —unsuccessfully defended charges of TIL violations on the basis of the McCarran Act. The administrative law judge said:

> [T]he credit transactions here involved do not pertain to the particular details of the policy being purchased. The policy is purchased from [the insurance company], or such other insurance company as may be involved. The credit, as extended by [the premium finance company] to the insured, does not purport to involve the insurer regarding any of the policy's details. The policy is a self-contained document quite apart from the credit arrangement.
>
> • • • • • • • •
>
> [The premium finance company] is not an insurance company. It is in the business of extending consumer credit, and, in the course of that business, it collects outstanding obligations to it. It is not engaged in the

> business of insurance simply because its loans are limited for the purpose of financing insurance premiums. It is no more in the business of insurance than a company which lends money for a number of purposes, including the financing of insurance premiums.

89 F.T.C. at 355-56.

In short, Paco cannot be said to be in the "business of insurance" simply because an insurance policy is tangentially involved. Although the borrower may appoint the premium finance company as his attorney to cancel the insurance in the event of default by the borrower, this does not make the lender-borrower relationship a part of the relationship between the insurer and the insured. Nor does the fact that the premium finance company takes a security interest affect the insurer-insured relationship. Paco's relationship to the business of insurance is much like that of an "ordinary" commercial lender to the business that receives the funds obtained by the borrower. When a bank repossesses and sells a car in which it has a secured interest to collect on a defaulted loan, it would be ludicrous to assert that the bank is in the automobile business. Similarly, a savings and loan association that lends money to the purchaser of a home is not in the business of selling real estate merely because it can exercise certain rights with respect to the property in the event of default. The lender's connection with the businesses involved in each of these situations is simply too tenuous, and similarly, premium financing has only a peripheral connection with the business of insurance.

Furthermore, even if we agreed with the district court that premium financing has a "considerable impact on the cost of the insurance," 409 F.Supp. at 223, that impact is insufficient to sustain a McCarran Act defense. "An activity is not a part of the business of insurance solely because it has an impact, favorable or otherwise, upon premiums



charged by the insurer." *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375, 1386 (5 Cir. 1977).

Accordingly, we hold that premium financing by an independent premium finance company does not constitute the "business of insurance" for purposes of the McCarran Act.[14] Therefore, the McCarran Act does not preclude the application of TIL's disclosure requirements to the transactions in the cases before us. The McCarran Act is to be "narrowly construed in the face of valid federal regulatory interests," *Securities and Exchange Comm'n v. Republic Nat'l Life Ins. Co.*, 378 F.Supp. 430, 436 (S.D.N.Y.1974), and it is obvious that TIL reflects such interests.[15]

The judgments in both *Cochran* and *Jones* are thus reversed and the cases remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BROWN, Chief Judge, concurs in the result.

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[14] At least one commentator has reached this conclusion. Krischer, *supra*, 30 Bus.Lawyer at 976. *See also* Comment, *Federal Regulation of Insurance Companies; The Disappearing McCarran Act Exemption*, 1973 Duke L.J. 1340, 1347-48 (exemption applies only when insurance company is engaged in an activity falling within Supreme Court's "restrictive definition" of the business of insurance).

[15] Because of our holding that Paco's premium financing activities do not constitute the "business of insurance," our inquiry proceeds no further, and we need not consider whether Georgia has "enacted any law . . . for purposes of regulating" such activities or whether TIL would "invalidate, impair, or supersede" such state law.

## APPENDIX Q

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Jan. 2, 1979.

No. 76-2709.

SYLVIA PERRY, Individually and on behalf of all others similarly situated, *Plaintiffs-Appellants,*

v.

FIDELITY UNION LIFE INSURANCE COMPANY, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Alabama.

* * *

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

In *Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1978), we held today that the lending activities of a premium finance company do not constitute the "business of insurance" and that the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. §§ 1011 *et seq.*, does not preclude application of the disclosure requirements of the Truth in Lending Act ("TIL"), 15 U.S.C. §§ 1601 *et seq.*, to the transaction.

The instant case, the second in today's triology,[1] presents a related question: whether the McCarran Act bars TIL's application when an insurance company provides premium financing in connection with the sale of an insurance policy.

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[1] The third case is *Cody v. Community Loan Corp.*, 606 F.2d 499 (5th Cir. 1978).

The district court held that the McCarran Act was a good defense to plaintiff's TIL action and granted summary judgment for the defendant insurance company. We reverse.

### I. Factual Background

Sylvia Perry was a college student in Alabama when a salesman from Fidelity Union Life Insurance Co. sold her a life insurance policy in June, 1974. To obtain the policy, which had annual premiums of $295, she made a $10 down payment and executed a promissory note to Fidelity for the remainder of the first year's premium. Fidelity provided Perry a form entitled "Disclosure Statement and Acceptance of Policy,"[2] which stated that she would be paying $134 in interest over the five-year life of the note. Perry made no further payments on the note, which was ultimately assigned to a bank.

---

[2] This statement provides, in pertinent part:

(3) Cash Price of Policy (Annual Premium) .....$295.58
(4) Cash Downpayment .....$ 10.00
(5) Unpaid Balance of Cash Price .....$285.58
(6) Unpaid Balance .....(Same as Item 5)
(7) Amount Financed .....(Same as Item 5)
(8) Total FINANCE CHARGE (interest) .....$134.03
(9) Deferred Payment Price (3 + 8) .....$429.61
(10) Total of Payments (5 + 8) .....$419.61

The Total of Payments is payable in a single payment due 6-13-79, except if the above Policy terminates, the Note may be declared immediately due and payable.

(11) ANNUAL PERCENTAGE RATE .....8.00%
(12) Date of Note .....6-13-74
(13) Finance Charge Accrues From .....6-13-74

Record at 46.

Had Perry paid later premiums, she would have received a cash payment at the end of the fifth year (the policy's fifth anniversary endowment) that would have covered a substantial portion of the first year's premium.



On June 24, 1975, Perry, on behalf of herself and all persons similarly situated, filed this suit, alleging that she had entered into contractual relations with Fidelity in the nature of a consumer credit transaction and that Fidelity's disclosure forms violated TIL and Regulation Z, 12 C.F.R. § 226.1 et seq.[3] She sought the statutory penalty for herself and the class, costs, and attorneys' fees.[4] Following discovery, Fidelity successfully moved for summary judgment on the ground that the McCarran Act barred application of TIL to the Perry transaction.

The district court, in an unreported opinion, held that (i) the disclosure of credit information of a premium

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[3] Perry alleged the following violations of TIL:

(1) failure to disclose the finance charge as an accurate annual percentage rate computed in accordance with the provisions of 15 U.S.C. §§ 1606, 1638(a)(7), and 12 C.F.R. §§ 226.5(b), 226.8(b)(2);

(2) failure to furnish a completed, duplicate copy of the disclosure statement containing all the required disclosures prior to the consummation of the consumer credit transaction as required by § 226.8(a);

(3) failure to disclose the "total down payment" as required by § 226.8(c)(2);

(4) use of the term "cash price of policy (annual premium)" instead of "cash price," as required by §§ 226.6(a), 226.8(c)(1); and

(5) use of the term "total finance charge (interest)" instead of "finance charge," as required by §§ 226.6(a), 226.8(c)(7).

Record at 3.

After discovery, Perry admitted that if the finance charge was correctly reported, the annual percentage rate was accurately computed. However, she sought to amend the complaint to allege that the finance charge was too low and the cash price too high. The record is silent as to whether this amendment was allowed.

[4] 15 U.S.C. § 1640(a). Count II of the complaint presented a state law claim. At the pretrial conference the parties agreed to submit the case on the sole issue of the McCarran Act defense, on which Fidelity prevailed, and the state law claim is thus not before us.

financing arrangement is part of the business of insurance; (ii) the State of Alabama has exercised its power to regulate the premium financing aspect of the business of insurance; and (iii) application of TIL to this particular transaction would require a construction of TIL that would invalidate, impair or supersede Alabama law enacted for the purpose of regulating the business of insurance. This appeal followed.[5]

### II. Discussion

Our opinion in *Cochran v. Paco, Inc., supra,* establishes the analytical framework for determining the applicability of the McCarran Act. Since we held in *Cochran* that TIL does not specifically relate to the business of insurance, 606 F.2d at 464, we turn immediately to the next inquiry, that is, whether Fidelity's premium financing activities, carried out in connection with its sale of an insurance policy, constitute the "business of insurance." We hold that it does not and that the McCarran Act is no bar to the application of TIL. Accordingly, we need not determine whether Alabama has "any law enacted . . . for the purpose of regulating" the financing activities or whether TIL would "invalidate, impair, or supersede" such state law. *Cochran, supra,* 606 F.2d at 467 n.15.

There is no doubt that the sale of an insurance policy is squarely within the "business of insurance." *Securities & Exchange Comm'n v. National Securities, Inc.,* 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). However, the financing of such a sale is a different activity. As we said in *Cochran,* premium financing "has little—if any—effect on an insurance company's ability to pay claims or on the nature of [its] policies" and "has only

[5] The Board of Governors of the Federal Reserve System filed in this appeal the same *amicus curiae* brief submitted in support of appellant's position in *Cochran v. Paco, Inc., supra.*



a peripheral connection with the business of insurance," 606 F.2d at 466-467. We do not think that the nature of premium financing changes, in chameleon-like fashion, simply because an insurance company rather than a loan or finance company authors the promissory note. Not all insurance company activities constitute the business of insurance, and the McCarran Act does not insulate every operation of every insurance company from federal regulation. *Cochran, supra,* at 465 n.13.

It would be anomalous to hold that Fidelity's premium financing activities are the "business of insurance" but that the identical activities of the finance company in *Cochran* are not. The appropriate focus is thus the nature of the activity itself, not the type of business that is conducting it.

In making available premium financing, an insurance company is acting not as an insurer but as a creditor, and the financing activity is purely ancillary to the insurance relationship between the insurance company and the policyholder. Premium financing has virtually nothing to do with a company's reliability as an insurer, a factor that stands at the center of the insurer-insured relationship. *National Securities, supra.* When an insurance company offers premium financing as an inducement for persons to purchase policies, it plays two distinct roles in its relationship with the purchaser. On the one hand, the company is an insurer, the purchaser an insured; but on the other hand, the company is a creditor, the purchaser a debtor. The former relationship constitutes the "business of insurance," while the latter does not.

We do not doubt that an insurance company can, by offering a premium financing package, facilitate the sale of insurance policies. But that alone cannot elevate the activity to the "business of insurance," for one can hardly claim that the extension of credit is an integral part of

the insurance business. As we have said in the antitrust context, business activities of insurance companies not peculiar to the insurance industry are outside the scope of the "business of insurance." *Royal Drug Co. v. Group Life & Health Ins. Co.*, 556 F.2d 1375, 1386 (5 Cir. 1977), *see also Battle v. Liberty Natl. Life Ins. Co.*, 493 F.2d 39, 50 (5 Cir. 1974), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).[6]

Accordingly, we hold that premium financing by an insurance company does not constitute the "business of insurance" within the meaning of the McCarran Act and that the McCarran Act is thus no bar to the application of TIL's disclosure requirements. The judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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[6] We recognize that other courts, in other contexts, have held that an insurance company's inducing persons to become policyholders is part of the business of insurance. *E. g., Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233 (2 Cir. 1975) (antitrust action challenging Equitable's requirement that plaintiff purchase life insurance as precondition to granting mortgage loans); *Addrisi v. Equitable Life Assurance Soc'y*, 503 F.2d 725 (9 Cir. 1974), *cert. denied*, 421 U.S. 922, 95 S.Ct. 1590, 43 L.Ed.2d 790 (1975) (same). However, in these cases the inducement was actually a requirement, and forcing prospective policyholders to buy insurance cannot be equated with making the purchase "easier" by offering premium financing. Moreover, if this "inducement" rationale were applied in the financing context, the activities of any lender who engaged in premium financing would constitute "the business of insurance." We have rejected such a result in *Cochran v. Paco, Inc., supra*, and application of the "inducement" theory in the instant case would make the McCarran Act's applicability turn on *who* is engaged in premium financing rather than on the *nature* of that activity.



JOHN R. BROWN, Chief Judge, dissenting:

This appeal presents the esoteric question whether § 2(b) of the McCarran-Ferguson Act (the McCarran Act), 15 U.S.C.A. § 1012(b), bars the application of the disclosure requirements of the Truth-in-Lending Act, 15 U.S.C.A. §§ 1601 *et seq.* (TIL) when an insurance company provides premium financing in connection with the sale of an insurance policy in Alabama, and the form used in disclosing the credit terms to the policyholder has been submitted to and approved by the Department of Insurance as required by Alabama law. I agree with the District Court that the McCarran Act is a good defense to the action and dissent from the contrary holding of the majority.

### I. Prologue

Building on *Cochran v. Paco's* [1] holding, in which I concurred that a non-insurance company premium financing enterprise is not engaged in "the business of insurance," the Court makes a mighty leap to conclude that when the premium financing is extended directly by the selling insurance company, this is likewise not the "business insurance."

Its principal thesis is that (i) premium financing—by whomsoever advanced—does not concern or affect the "relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement," *SEC v. National Securities, Inc.*, 1969, 393 U.S. 453, 460, 89 S.Ct. 564, 569, 21 L.Ed.2d 668, 676 (quoted in *Cochran, ante*, 606 F.2d at 465, and (ii) in extending premium financing "an insurance company is acting not as an insurer but as a creditor" [2] so that (iii)

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[1] 5 Cir., 1979, 606 F.2d 460.

[2] Majority opinion, *ante*, 606 F.2d at 470.

"the financing activity is purely ancillary to the insurance relationship between the"[3] insurer and policy holder.

There are a number of faults with this approach, some of which warrant the later detailed discussion.

At the outset, I firmly believe that that which insurance companies regularly and customarily do in the solicitation and sale of policies of insurance is, and is to be considered as, a part of the "business of insurance." And yet here there is not a single stitch of record evidence that premium financing is or is not a regular, accepted part of the insurance business. On the contrary, all that we have is the Court's statement that this activity is merely ancillary—a fact drawn presumably from the wisdom Article III and life tenure generate.

In the next place, the very activity under scrutiny is so much a part of the business of insurance that it is precisely regulated by the Alabama Superintendent of Insurance[4] pursuant to the Department's authority to regulate and superintend insurance companies, not lenders of credit. And these regulations specifically relating to the sale of life insurance to college students[5] reflect an awareness by Alabama insurance authorities that sales practices—including extension of liberal premium financing—go to the very heart and integrity of the selling insurer.

For example, the regulations condemn the practice of inducing the college student applicant to drop or replace

[3] Majority opinion, *ante*, 606 F.2d at 470.

[4] See note 22, *infra*.

[5] Regulation by the states has a dual function. First, as urged here, it demonstrates that that which insurance authorities regulate must be a part of "the business of insurance." Second, as developed later on, it meets the subsidiary question outlined in *Cochran*, 606 F.2d at 463 of regulation by the state and impairment of state regulation.



existing insurance (see note 22, *infra*, item 11) and recommend that a financed program should not be *sold* to an undergraduate on a basis where premiums would come due prior to the anticipated date of graduation by the insured (see note 22, *infra*, item 10). The guidelines are enacted in the "* * * hope * * * of offering additional safeguards for the protection of this segment of the insurance buying public." (Note 22, *infra*, introduction).

Whatever this Court might think, it is plain that Alabama believes that the method of selling insurance, including the insurer's extension of premium financing, goes to "the type of policy which could be issued [and] its reliability." *SEC v. National Securities, Inc., supra*, 1969, 393 U.S. at 460, 89 S.Ct. at 568.

And the Court's effort to camouflage the problem by declaring that it "* * * would be anomalous to hold that [the insurers'] premium financing activities are the 'business of insurance' but that the identical activities of the finance company in *Cochran* are not,"[6] is not only bad law. It is worse economics. The principal difference is that with a premium financing company the insurer bears none of the risk of late or non-payment. It is paid in full, subject only to possible rebate of unearned premiums if the financier has and exercises a right of cancellation in the event of default by the policyholder-borrower. And this distinction is not obliterated by the insurer's discounting of the premium note to, say, a third party bank. The assignee would normally have recourse against the insurer-assignor. So the risk—and the consequent diminution of the insurer's assets—remains on the insurer.

Finally, it is an artificial oversimplification to speak in terms, not of insurer-insured, but of debtor-creditor. Life insurance is customarily sold with installment premiums—semiannually, quarterly, monthly, or the like. And

[6] *Perry, ante*, 606 F.2d at 470.

yet under regulations of the state insurance authorities, the terms of the policy, or both, a grace period, usually of thirty days is afforded. Clearly that is extension of credit, but it is equally clear that this goes to the very heart of the relationship between insurer and insured and to the continued integrity of the policy.

Next, on failure to pay premiums, it is common for the policy, pursuant to local state regulation, to provide for paid up insurance of a specified amount or extended insurance for the policy limit for a specified period of time. This is, albeit sophisticated, credit reflecting a debtor-creditor relationship but indeed much more, a relationship between insurer and insured.

Similarly, again pursuant to state regulation, life insurance policies generally provide for policy loans to the extent of the paid up or cash loan surrender value. Once such a loan is procured there is, to be sure, the debtor-creditor relationship, but it arises out of the continuing insurer-insured relationship.

It must come as quite a surprise to the nation's multi-billion dollar insurance enterprises to learn that premium financing is not an integral part of the "business of insurance" but is a mere incidental appendage of the debtor-creditor relationship.

This, in my judgment, ignores the legislative history and purposes of the McCarran Act. The activities here are thus exempt from TIL as the District Court properly held. I therefore respectfully dissent.

### II. The Legislative History Of The McCarran Act

In *Paul v. Virginia,* 1869, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357, the Supreme Court held that the issuance of an insurance policy was not a transaction of commerce. For the three-quarters of a century following *Paul,* it was assumed that the regulation of insurance transactions



rested exclusively with the states. However, *United States v. South-Eastern Underwriters Assn.,* 1944, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, gave lie to that assumption, the Court holding that insurance transactions stretching across state lines were subject to federal regulation under the Commerce Clause and that federal antitrust laws applied to them. Both Houses of Congress, characterizing *South-Eastern* as "precedent-smashing," H.R.Rep.No.143, 79th Cong., 2d Sess. (1945), *reprinted in* 1945 U.S.Code Cong.Serv. 670, 671; S.Rep.No.20, 79th Cong., 1st Sess. 2 (1945), reacted quickly and legislative reversal of *South-Eastern* was accomplished by the McCarran Act.[7] (See discussion of the McCarran Act in *Cochran v. Paco, ante,* 606 F.2d at 462-463.)

The House Report which accompanied the bill demonstrates Congress' intent to return matters to the status quo ante:

> It is not the intention of Congress in the enactment of this legislation to cloth the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. . . .

H.R.Rep.No.143, *supra,* 1945 Code Cong. Serv. at 671; *see SEC v. National Securities, Inc.,* 1969, 393 U.S. 453, 459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668, 676. The proviso of

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[7] Because Congressional debate principally focused on the application of federal antitrust laws to the business of insurance—a subject of only peripheral concern to us here—we believe it helpful to attach as an Appendix excerpts from the Congressional debates on the McCarran Act which concerned state regulation of insurance companies in non-antitrust areas. Some excerpts focusing on antitrust are also included because of their implications in other areas. These excerpts appear in chronological order and have been numbered for easy reference.

§ 2(b) served as an invitation to the states to legislate in the antitrust field during the moratorium period.

Thus, it is clear that Congress returned to the states the plenary power to regulate the business of insurance which they had previously enjoyed.[8] Congressional "silence" (see § 1012(a) quoted in *Cochran, ante,* 606 F.2d at 462) meant that states were free to occupy the insurance business field subject to controlling Supreme Court decisions prior to *South-Eastern. See* H.R.Rep.No.143, *supra,* at 671-72. On the other hand, when Congress desired to invoke its Commerce Clause powers to occupy any part of the field then or in the future, it would expressly say so.[9] Stated another way, Congress wanted to ensure that no future federal legislation enacted under the Commerce Clause, not specifically relating to insurance, would be construed as an implied repeal of the

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[8] This power was understood to be constitutionally limited by the states' inability to regulate outside its borders. *See FTC v. National Casualty Co.*, 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540; Atwell, The McCarran-Ferguson Act—A Deceptive Panacea?, 5 *The Forum* 339, 340 (1970); Appendix, excerpts [9], [10], [12].

[9] The Supreme Court enumerated the two ways in which Congress gave its support to existing and future state systems for regulating and taxing the business of insurance:

> One [way] was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

*Prudential Ins. Co. v. Benjamin,* 1946, 328 U.S. 408, 429-30, 66 S.Ct. 1142, 1155, 90 L.Ed. 1342, 1360. See Appendix, excerpts [11], [12], [18].



McCarran Act which sanctioned continued state regulation.[10]

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[10] See, for example, the following remarks of Senator Ferguson:

> If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, *if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill [the McCarran Act], and this bill would not be affected, because the Congress had not, under subdivision [2] (b), said that the new law specifically applied to insurance.* I think that makes the bill very clear.

91 Cong.Rec. 481 (Jan. 25, 1945) (emphasis added). See also Appendix, excerpts [1], [2], [4]-[7], [22].

Although the Court rejects it, I think it helpful to give a detailed answer to the contention made by the Federal Reserve Board in its amicus brief which states:

> An examination of the legislative history of the McCarran-Ferguson Act indicates that Congress originally intended that [the] McCarran-Ferguson Act's prohibition of Federal preemption of State laws regulating the business of insurance only be applicable to insurance-related activities otherwise within the purview of Federal antitrust laws. The [state] Act under consideration most certainly is not an antitrust statute.
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> • • • • • •
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> . . . [W]hen Congress spoke of State regulation of the business of insurance, it was concerned with the States' regulating what would have been covered potentially by the Federal antitrust laws.

Amicus brief at 16-18.

The Board is asserting that TIL should apply because the only state regulatory legislation within the purview of the McCarran Act is that correspondent to the federal antitrust laws. As does the Court, I reject this contention as totally without merit. The plain words of the Act itself are dispositive on this score. For example, state tax laws relating to the business of insurance are expressly covered by 15 U.S.C.A. §§ 1011, 1012(a), (b). Tax laws, as far as we known, have nothing to do with antitrust laws. And if the plain words of the statute were not enough, the remarks

Moreover, I also glean from the legislative history of the McCarran Act that the states were free to regulate as they saw fit. For example, the following statement appears in S.Rep.No.1112, 78th Cong., 2d Sess., 5 (1944):

> If the States are to be permitted to regulate, they should be permitted to regulate as they each see fit. The committee believes that in considering the nature of the business of insurance, its closeness to policyholders in the several States, the established systems of regulation and control by the States, and the experience and attitude of State insurance commissioners, regulation by the States should not be circumscribed by the establishment of any control over their power of regulation or the exercise by them of that power.

See also H.R.Rep.No.873, 78th Cong., 1st Sess., 9 (1943):[11]

> Insurance is also fundamentally local in character, and therefore best regulated by the States. . . . All insurance policies are entered into in one State or another and that State in which they are entered into may through State regulation meet all problems presented. If regulation be undertaken by the Federal

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of Senator Ferguson quoted above and those of other Congressmen set forth in the Appendix (see excerpts [1], [2], [5], [7], [11], [12], [14], [16], [17], [18], [19], [20], [22], [24]) should dispel all doubts. Moreover, § 4 of the McCarran Act, 15 U.S.C.A. § 1014, which makes the National Labor Relations Act and the Fair Labor Standards Act specifically applicable to the business of insurance serves as a further demonstration of a crystal clear intent that Congressional silence meant the states were free to regulate insurance in areas having no relationship to antitrust.

[11] Both S.Rep.No. 1112 and H.Rep.No. 873 related to an earlier version of the Act, H.R. 3270. *See generally* Note, A Year of S.E.U.A., 23 Chi.Kent L.Rev. 317 (1945); Comment, Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption, 1973 Duke L.J. 1340, 1342 & n.12.



> Government this must inevitably result in a general pattern which is not applicable in meeting the requirements of the different States as they should be met and as those States now meet them. The fundamental fact is that under the law as it exists today each State has ample power to regulate as it may see fit. How it regulates is a matter for it to determine. . . . State regulation has promoted efficiency and satisfaction in the insurance business, and . . . such a result has been accomplished with a steady decrease in insurance rates throughout the country. . . . [T]here is no reason why the States should not continue to meet developments by the exercise of that power.

Subsequent decisions have recognized that, at the time of the Act's passage, Congress was well aware that the states' regulatory schemes differed widely and that uniformity of regulation was not a McCarran Act purpose except in respects expressly provided for then and down the road. *See, e.g., Prudential Ins. Co. v. Benjamin,* 1946, 328 U.S. 408, 430-31, 66 S.Ct. 1142, 90 L.Ed. 1342, 1360-61; *Dexter v. Equitable Life Assurance Soc.,* 2 Cir., 1975, 527 F.2d 233, 236; *Ohio AFL-CIO v. Insurance Rating Board,* 1971, 6 Cir., 451 F.2d 1178, 1183, *cert. denied,* 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180. See Appendix, excerpts [3]-[6]. In 1945, Congress stilled its power, and Courts have subsequently eschewed power to decide which state regulatory scheme is best or whether the state scheme represents the wisest and most effective type of regulation. See Appendix, excerpts [1], [2], [5], [7], [11], [12], [14], [16]-[20], [22], [24]; *Commander Leasing Co. v. Transamerica Title Ins. Co.,* 10 Cir., 1973, 477 F.2d 77; 84; *Allstate Ins. Co. v. Lanier,* 4 Cir., 1966, 361 F.2d 870, 873, *cert. denied,* 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212; *McIlhenny v. American Title Ins. Co.,* E.D.Pa., 1976, 418 F.Supp. 364, 370; *Fleming v. Travelers Indemnity Co.,* D.Mass., 1971, 324 F.Supp. 1404, 1406; *Holly Springs Funeral Home v. United Funeral Serv., Inc.,* N.D.Miss., 1969,

303 F.Supp. 128, 135. Following the instruction of the Supreme Court, we must

> . . . start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of 'insurance,' they speak with the authority of a long tradition.

*SEC v. Variable Annuity Co.*, 1959, 359 U.S. 65, 68, 79 S.Ct. 618, 620, 3 L.Ed.2d 640, 643.

### III. Specifics

Against this background, and in light of McCarran Act jurisprudence, I proceed on the basis of this Court's analysis in *Cochran v. Paco, ante,* 606 F.2d at 464 to determine (i) whether TIL "specifically relates" to the business of insurance, (ii) if not, whether premium financing constitutes the "business of insurance," and (iii) if so, whether Alabama has enacted regulatory laws (iv) which would be "invalidated, impaired or superseded" by TIL.

*A. "Specifically Relates"*

I agree with the Court's resolution in *Cochran, ante,* 606 F.2d at 464, of the initial question: TIL does not "specifically relate to the business of insurance" within the meaning of § 2(b) of the McCarran Act, 15 U.S.C.A. § 1012(b). Nowhere in TIL is there the equivalent of § 4 of the McCarran Act,[12] 15 U.S.C.A. § 1014, which specifically relates TIL's provisions to the business of insurance. Nor is there any other indication in TIL that we should construe that statute as an implied repeal of the McCarran Act.

[12] 15 U.S.C.A. § 1014 provides:

> § 1014. Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938
>
> Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.
>
> Mar. 9, 1945, c. 20, § 4, 59 Stat. 34.



*B. "Business of Insurance"*

It is with regard to the second issue that I most strongly disagree with the majority. In the companion case, *Cochran v. Paco,* we held that, according to *National Securities,* "the key factor is the relationship between the insurer and the insured," *ante,* 606 F.2d at 466. *Cochran* involved no such relationship since the defendant was not an insurance company, but an independent premium finance company. Therefore, I believe we reached the correct result by there holding the McCarran Act inapplicable. But I cannot agree that the *National Securities* rule compels the same result in the instant case where the insurer-insured relationship does exist. The District Court concluded that "the availability of premium financing is a part of the sale of an insurance policy, and the disclosure of the terms and conditions of such an arrangement directly pertains to "the relationship between the insurer and the policyholder." (Unpublished opinion at 6.) I must agree.

Although the Court does not expressly embrace *American Family Life Assurance Co. v. Planned Marketing Assoc.*, E.D.Va., 1974, 389 F.Supp. 1141, it indirectly relies on this decision to attack the District Court holding in the instant case, *ante,* 606 F.2d at 470. *American* stated that business activities *not peculiar* to the insurance in-

dustry were subject to federal law. Thus, the Court today holds that *credit disclosure* is "not peculiar" to the insurance industry and TIL should apply.

We believe the Court conveniently ignores what the "not peculiar" language of *American* actually meant. The activities which were stated to be "peculiar" to the industry were precisely those set forth in *National Securities:*

> Acts peculiar to the insurance industry would include such things as the relationship between the insurer and the insured, the language and content of an insurance policy, the financial reliability of an insurance company and other similar matters involved in the insurance industry.

389 F.Supp. at 1145. *American* thus did no more than coin a shorthand phrase for the *National Securities* standard.[13] To adopt the interpretation of "not peculiar" which Perry urges would mean, for example, that ratemaking and advertising—activities certainly not "peculiar" to the insurance industry in any sense of the word—fall outside the scope of the McCarran Act. And the Supreme Court has expressly stated in *National Securities* that these activities constitute the business of insurance (see quote from *National Securities* in *Cochran, ante,* 606 F.2d at 465.

I have found no cases directly on point, but there are some which provide guidance. In *Gerlach v. Allstate Ins.*

[13] This Circuit has recently applied the "not peculiar" test in a factual situation far different from the one presently before us. In *Royal Drug Co. v. Group Life & Health Ins. Co.*, 5 Cir., 1977 556 F.2d 1375, the Court held that an agreement between a group insurer providing prescription drugs and participating pharmacies did not constitute the business of insurance for McCarran Act purposes. The Court, relying on *National Securities,* cited *American* for the "not peculiar" holding. *Id.* at 1386. Nothing we say here is inconsistent with *Royal* which did not involve a direct insurer-insured relationship.



*Co.*, S.D.Fla., 1972, 338 F.Supp. 642 (discussed in *Cochran, ante,* 606 F.2d at 466, it was stated in dictum:[14]

> Florida law, as part of the Florida Insurance Code, regulates insurance premium finance companies and premium financing . . ., and specifically sets forth . . . what disclosures are required in a premium financing agreement. Thus, although Allstate's transaction is not premium financing, this Florida regulatory legislation on the same subject as Truth in Lending, namely, disclosure, would have precluded applicability of Truth in Lending in insurance premium consumer credit transactions in Florida.

*Id.* at 650.

While I join the Court in impliedly declining to adopt this sweeping language, I do believe that when an insurance company offers premium financing as part of the inducement to purchase a policy of insurance, that inducement is as integrally related to the sale of the policy as is, say, advertising, and such activity necessarily falls within the business of insurance. It would be anomalous to hold that advertising practices hawking to the world at large the advantages of insurance fall within McCarran and a loan of money—an inducement to purchase made directly to the policyholder by the insurance company—does not. Other courts, in different contexts to be sure, have used the "inducement" reasoning to apply McCarran.

Before turning to two other cases which I find helpful on this issue, I emphasize again, as discussed[15] in *Cochran,*

[14] For an appraisal of *Gerlach, see* Krischer, "Truth" in Insurance Premium Financing, 30 *Business Lawyer* 969, 973-74 (1975).

[15] The legislative history of the Act is less extensive in areas outside the antitrust sphere—and understandably so. *South-Eastern,* after all was an antitrust case and Congressional debate

*ante,* 606 F.2d at 464, that there is no reason not to apply standards developed in antitrust cases in interpreting the terms of the McCarran Act. "Regulating" for antitrust purposes does not mean something different than "regulating" for purposes other than antitrust.[16] It is well to remember what the Supreme Court said in *National Securities.* "Statutes aimed at protecting or regulating this relationship [between the insurance company and the policyholder], directly or indirectly, are laws *regulating* the 'business of insurance.'" 393 U.S. at 460, 89 S.Ct. at 569, 21 L.Ed.2d at 676 (emphasis added). To be sure, *National Securities* focused on what comprised the insurance business, but there is not a hint in that or any Supreme Court case of which we are aware—and Perry cites none—that the fine distinction asserted is warranted.

In *Dexter v. Equitable Life Assurance Soc.,* 2 Cir., 1975, 527 F.2d 233, 235, the plaintiff brought an antitrust action against Equitable for requiring him to purchase life insurance as a precondition to granting mortgage loans. Following *Addrisi v. Equitable Life Assurance Soc.,* 9 Cir., 1974,

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focused primarily on reversing its effects. See, for example, the Senate debate on the Conference Report attached as an Appendix to the dissent of Judge Godbold in *Crawford v. American Title Ins. Co.,* 5 Cir., 1975, 518 F.2d 217, 230-36.

[16] The argument to the contrary seems to be that McCarran antitrust cases address primarily two issues: (i) Is the activity within the business of insurance? and (ii) To what extent is the business regulated by state law? On the other hand, in non-antitrust cases, Perry argues, a third issue must be decided, namely, does the application of the relevant federal law "invalidate, impair, or supersede" the state law? From this, Perry asserts that the antitrust cases defining "regulate" cannot be read in a vacuum apart from the cases construing "invalidate, impair, or supersede." For reasons addressed hereinafter, we do not believe that the District Court was guilty of this analytical mistake. See Part III-C, *infra.*



503 F.2d 725, *cert. denied,* 1975, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400, the Second Circuit held that the challenged tying arrangement was part of the business of insurance under *National Securities'* insured-insurer relationship standard. The Second Circuit stated:

> An insurance company's methods of inducing people to become policyholders pertain to the company-policyholder relationship, and thus constitute an integral part of 'the business of insurance.'

*Id.* at 235.

The Court would distinguish these cases by saying that the purchase of insurance "was actually a requirement, and forcing prospective policyholders to buy insurance cannot be equated with making the purchase 'easier' by offering premium financing." *Ante,* 606 F.2d at 471, note 6. While premium financing may make the purchase of insurance "easier" for some, I am sure there are many others for whom such financing is quite necessary in order to acquire insurance coverage. In any event, premium financing is certainly as much an inducement for the purchase of insurance as advertising, which is covered by the McCarran Act exemption. In sum, I find these cases parallel the facts before us and do give us guidance.

In effect, the Court adopts Perry's attempt to avoid the hard cold fact that this transaction was between the insurer and the policyholder by pointing out that Fidelity negotiated the promissory note to a bank. She argues that the effect of the note created a separate debtor-creditor relationship between Perry and a different entity. Thus, she asserts, Fidelity "has created an arrangement with a third party which, although possibl[y] related to the 'business of insurance', is nevertheless 'so remotely related' as to remain subject to not inconsistent requirements of Federal laws like the Truth-In-Lending Act, and

outside the protection of the narrow McCarran Act exemption."

I fail to see what possible bearing the subsequent negotiation of Perry's promissory note could have on the original transaction between Perry and Fidelity insofar as the McCarran Act is concerned. Perry was and remained the policyholder and Fidelity was and remained the insurer. The later negotiation may have created a new and separate debtor-creditor relationship between Perry and the bank, but that new relationship did not alter or supplant in any respect the original, ongoing Perry-Fidelity consanguinity.

Finally, the Court holds in effect that the loan was not vitally connected with the insurance policy; in other words, Perry could have paid cash and avoided financing altogether. The theory is that financing of the premiums is unrelated to the policy, its reliability, interpretation or enforcement. No authority is cited to support this theory which I believe defies both precedent and logic. First, the Supreme Court teaches that the litmus test is *not* a "vital connection" between the activity and the policy; it is the connection between the insurance company and the policyholder and what transpires between them—the " 'insurance' relationship," with which Congress was concerned. *National Securities*, 393 U.S. at 460, 89 S.Ct. at 568-69, 21 L.Ed.2d at 676. Second, I cannot see any less vital connection between that insurance relationship and premium financing on the one hand, and advertising, for example, on the other. Obviously the precise metes and bounds of the term "business of insurance" are far from clear and we need not set them here. But where, as in the present case, the core relationship exists, we are well within McCarran, no matter how broadly or narrowly its exemption is construed.[17]

[17] The cases cited by Perry to support the proposition that credit disclosure is not the business of insurance are inapposite: *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, S.D.N.Y., 1968, 291 F.Supp. 225, *aff'd*, 2 Cir., 1969, 408 F.2d 606; *Hart v. Orion Ins. Co.*, 10 Cir., 1971, 453 F.2d 1358; *Sears, Roebuck & Co. v. All States Life Ins. Co.*, 5 Cir., 1957, 246 F.2d 161; *United States v. Sylvanus*, 7 Cir., 1951, 196 F.2d 96 (McCarran Act not a defense to indictment for use of mails to defraud in the sale of insurance policies); *Hill v. National Auto Glass Co.*, N.D.Cal., 1968, 293 F.Supp. 295; *Fry v. John Hancock Mutual Life Ins. Co.*, N.D. Tex. 1973, 355 F.Supp. 1151; *American Family Life Assurance Co. v. Planned Marketing Assoc.*, E.D.Va., 1974, 389 F.Supp. 1141. Of these cases only *Hart* and *Fry* involved a direct relationship between the insured and the insurer. In *Hart*, the plaintiff sought to invoke the arbitration provision in his policy and the Court held that the states involved did not regulate the business of insurance 453 F.2d at 1360. The Court never reached the question whether arbitration constituted the business of insurance. *Fry* is equally unhelpful to Perry since the District Court later reversed itself in light of *Addrisi, supra*, in an opinion which unfortunately was not published, Civil No. CA-2-1301, N.D.Tex., Amarillo Div., June 5, 1975.



*C. "Regulating"*

Although the Court did not address this issue, I must face it under *Cochran's* analytical approach as succeeding steps to achieve affirmance, not reversal. In 1957, Alabama —expressly responding to the Congressional invitation extended by the specific moratorium in the McCarran Act[18]—passed the Insurance Trade Practices Law, Title

[18] Ala. Code tit. 28A, § 227(1) provides:

> The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress [ch. 20, 59 U.S.Stat. at Large 33].) by defining, *or providing for the determination of*, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined *or determined*.

(Emphasis added.) It is obvious that the Alabama Legislature meant to cover not only those acts it specifically proscribed but those determined by the Insurance Commissioner to be unfair or deceptive at a subsequent date.

28A, § 227 *et seq.*, Code of Alabama. Section 228 specifically forbids "any trade practice which is defined in this chapter as, or *determined pursuant to this chapter to be,* . . . an unfair or deceptive act or practice in the business of insurance." (Emphasis added.) The Insurance Commissioner is given various administrative and supervisory powers to enforce the Act's prohibitions. Significantly, those powers extend not only to specific practices banned by the Act, but to unfair practices not defined. Ala.Code tit. 28A, § 247(1) provides in pertinent part:

> Whenever the commissioner has reason to believe that any person engaged in the business of insurance is engaging in this state in . . . any act or practice in the conduct of such business which is not defined in this trade practices law, that such . . . act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve such person a statement of the charges in that respect and a notice of hearing thereon . . . .[19]

[19] § 247(2) provides for instigation of court proceedings:

> (2) If such report charges a violation of this trade practices law and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after thirty (30) days after the service of such report, cause a petition to be filed in the circuit court of this state within the circuit wherein the person resides or has his principal place of business, to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.



Furthermore, insurance forms must be submitted to the Commissioner and none can be used without his approval.[20] Forms which are misleading are subject to disapproval or withdrawal of prior approval.[21] Section 28 authorizes the Commissioner to promulgate regulations for the effectuation of the form approval system and other provisions of the Act.

The District Court found first, that pursuant to this authority, the Commissioner had issued guidelines specifically related to the practice of offering life insurance to college students under a premium financing arrangement.[22]

[20] Ala. Code tit. 28A, § 321 reads in part:

> (1) No basic insurance policy or annuity contract form, or application form where written application is required and is to be made part of the policy or contract, or printed rider or endorsement form or form of renewal certificate, shall be delivered, or issued for delivery in this state, unless the form has been filed with and approved by the commissioner.

[21] Under § 322, the Commissioner may disapprove the forms on several grounds, three of which are relevant here: (i) if the form violates or fails to comply with Title 28A; (ii) if it has any title, heading, or other indication of its provisions which is misleading; and (iii) if it contains provisions which are unfair, inequitable, or contrary to the public policy of Alabama or which would, because such provisions are unclear or deceptively worded, encourage misrepresentation.

[22] These guidelines, which delineate the purposes they were designed to serve, are set forth in full:

JANUARY 1, 1971

*Effective January 15, 1971*

SUBJECT: GUIDELINES TO BE FOLLOWED BY COMPANIES OFFERING LIFE INSURANCE PLANS TO COLLEGE STUDENTS UNDER A PREMIUM FINANCING ARRANGEMENT

Proceeding under the assurance that a Life Insurance Plan sold to a College Student is:

(a) A good source of business for life insurance companies.

(b) A good plan on which young people can establish a sound financial insurance program.

It is felt, nevertheless, that this type of program presents certain areas of concern, particularly in the presentation of the policy when a premium financing arrangement is offered in connection with the sale of it.

In hope of strengthening this type of marketing procedure and at the same time offering additional safeguards for the protection of this segment of the insurance buying public, the following guidelines and procedures will be adopted by all companies and their agents offering this type policy in this state.

1. If the insured is a minor and executes a promissory note for the payment of the first year's premium, such note must be co-signed by the insured's parent, legal guardian, or adult spouse.

2. The giving of a promissory note in connection with the first premium must be set out in the application over the applicant's signature, showing the amount of the note, and the amount of any down payment made to an agent at the time of sale. (Note—It is strongly recommended by this office that a down payment be required as a prudent procedure.)

3. If a note is taken to finance less than the full first year premium, the balance must be paid by the applicant at the time the application is taken.

4. This down payment must be paid by the applicant in cash or by valid executed note and any payment, directly or indirectly, by the agent under any circumstances shall be construed to be a rebate or special inducement.

5. A copy of the note and any assignment must be attached to the policy, or in lieu thereof, the policy may contain a provision or endorsement which describes such financing arrangement.

6. Upon delivery, a policy receipt or acceptance form must be executed which recites that:

(a) The policy has been issued as represented

(b) The insured acknowledges and understands the provisions and obligations of the financial indebtedness that he has incurred.

7. Such receipt or acceptance form (outlined in Item 6 above) should be registered by number (preferably corresponding to policy number) in the home office.



(a) This receipt must be sent with the policy at time of delivery *only*.

(b) These receipts or acceptance forms shall not be made available as supplies to field representatives or agents but must be furnished from the Home Office in transmittal of the policy to the writing agent.

8. Promissory notes should not be sold or otherwise transferred by the payee (agent), nor any commissions on the sale paid to the agent until such form (outlined in Item 7 above) has been received in the Home Office of the Company.

9. The note purchaser, assignee, or company shall notify the note maker (Insured) and all co-makers regarding the purchase or transfer of the note, *after* such purchase or transfer, inviting any questions relative to the note, or the policy which is used as collateral security for the note.

10. Maximum amount of any financing arrangement which can be executed in connection with such a transaction will be in accordance with reasonable and sound underwriting practices as determined by the management of the company. (Note—It is the recommendation of this Office that a financed program should not be sold to an undergraduate on a basis where premiums would come due prior to the anticipated date of graduation by the insured.)

11. The disturbing of any permanent insurance, including the partial or total replacement of any provisions of an existing policy for the purpose of placing additional insurance, will be cause for necessary investigation and review by this Department's personnel.

12. Agents or field representatives of the company who are licensed by this State to represent the company as licensed life agents may not represent, refer to or hold themselves out to the public under any special title or as representatives of any special policy or company division unless otherwise identified as a licensed agent of the company for which he holds a license.

13. In the case of a request being made by an insured expressing a desire to cancel such a policy and premium arrangement, this Office will expect and fully appreciate the cooperation of the company and its agents in bringing such matters to a satisfactory conclusion as expeditiously as possible.

If, at the time the letter of acceptance is presented with the policy to the applicant for his signature and he decides

Second, the Fidelity-Perry form at issue [23] had been both submitted to and approved by the Commissioner. Third, the Court, applying the definition—a state regulates the business of insurance when it has generally authorized or

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he does not wish the plan, the policy will be returned to the company with his signed request for release. The policy and note will then be cancelled and the applicant released from any liability, and refund made of any down payment.

14. It is recommended that the cash values shown at the time of presentation should be a specimen of the policy being offered and not for a larger policy. For example, if you are selling a $10,000 policy, you should show the values for this policy and not for a $50,000 or $75,000 program. This leads to misunderstanding on the part of the insured when he receives his $10,000 policy and the cash values are less than what he was shown at the time of sale.

*NOTE—If a sales presentation is made for an amount of insurance greater than that sold, then an appropriate summary must be given to the Insured for the exact amount of policy sold not later than the date of delivery*

15. All sales material, notes, and other forms used in the sale of such programs must be submitted in duplicate with duplicate letters of transmittal at the time that the policy form is submitted for approval. If found acceptable, the duplicate copy of such materials will be returned as "filed". No such material may be used until so "filed" with the Department. No materials may be added or amended unless first submitted and found acceptable as outlined above.

16. Effective Date. This Bulletin shall be effective on and after January 15, 1971.

Done and ordered at Montgomery, Alabama, this 30th day of December A. D., 1970.

R. FRANK USSERY
SUPERINTENDENT OF INSURANCE

[23] See note 2 of the Court's opinion, *ante*.



permitted certain standards of conduct [24]—concluded that Alabama regulates the business of insurance within the meaning of § 2(b) of the McCarran Act.

Since the Court takes no position on this, I am forced to consider the argument put forward by Perry. She challenges this holding by comparing the meager requirements of the Alabama guidelines to the detailed requirements of TIL. She does not argue that Alabama fails to regulate the business of insurance at all, but that the State does not regulate it in a manner that will fulfill the purpose of TIL: to afford a meaningful comparison of credit terms. Perry essentially contends that form approval is meaningless in the absence of the specific credit disclosure requirements of TIL and posits the possibility that Fidelity could have submitted an entirely different form containing none of the disclosures and still have received approval within the existing regulations.

There are several answers to this contention. First, we have a form on which certain disclosures *were* made (see note 2 of Court's opinion, *ante*). The State approved *that* form—not a hypothetical one containing fewer or less detailed disclosures.[25] And if we are going to posit possibilities, for all we know the Insurance Commissioner could have determined that the Fidelity form was quite sufficient to make understandable "the provisions and obligations of the financial indebtedness that [s]he ha[d] incurred" (Guidelines, ¶ 6(b)) and that more detailed disclosures a la TIL were unnecessary. *See generally* Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An

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[24] This definition was first announced in *California League of Independent Ins. Producers v. Aetna Casualty & Surety Co.*, N.D. Cal. 1959, 175 F.Supp. 857, 860. See text accompanying notes 27 and 28, *infra*.

[25] Perry has conceded that there was *some* disclosure by characterizing Fidelity's efforts as "half-hearted compliance" with TIL regulations.

Emperical Look at the Simplification of Consumer Credit Contracts, 63 Virginia L.Rev. 841 (1977); Comment, 19 Buffalo L.Rev. 656, 670 (1970). A comparison of the form here and the TIL violations alleged (notes 2 and 3 of Court's opinion, *ante*) demonstrates that very technical violations are involved. Under these circumstances, the Alabama Insurance Commissioner could have viewed Fidelity's disclosures as fair and not deceptive.[26]

But we need not play the speculation game. As discussed in Part II, the law is clear that the particular scheme Alabama adopts for regulating the business of insurance is not a matter for the Courts to pass upon so long as it is regulating that business within the meaning § 2(b) as judicially interpreted.

Thus, we come to the definition of "regulating" which was applied below—a state regulates the business of insurance when it has generally authorized or permitted certain standards of conduct. This test was first announced in *California League of Independent Producers v. Aetna Casualty & Surety Co.*, N.D.Cal., 1959, 175 F.Supp. 857, 860. Despite the fact that it has been widely followed with only slight variation elsewhere[27]—and in the Fifth Cir-

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[26] [T]he obvious intent of Congress was to set standards by which to achieve meaningful "truth-in-length" and not to deviously set traps by which windfalls could be reaped by fanciful lawyers.

*Philbeck v. Timmers Chevrolet, Inc.*, 5 Cir., 1974, 499 F.2d 971, 981 n.22, *quoting Andrucci v. Gimbel Bros., Inc.*, W.D.Pa., 1973, 365 F.Supp. 1240, 1243.

[27] *E. g., Lawyers Title Co. v. St. Paul Title Ins. Corp.*, 8 Cir., 1975, 526 F.2d 795, 797; *Ohio AFL-CIO v. Insurance Rating Bd.*, 6 Cir., 1971, 451 F.2d 1178, 1181, *cert. denied*, 1972, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180; *Pierucci v. Continental Casualty Co.*, W.D.Pa., 1976, 418 F.Supp. 704, 709; *McIlhenny v. American Title Ins. Co.*, E.D.Pa., 1976, 418 F.Supp. 364, 369; *Mathis v. Automobile Club Inter-Ins. Exchange*, W.D.Mo., 1976, 410 F. Supp. 1037, 1040; *Gerlach v. Allstate Ins. Co.*, S.D.Fla., 1972, 338 F.Supp. 642, 650; *Holly Springs Funeral Home v. United Funeral Serv., Inc.*, N.D. Miss., 1969, 303 F.Supp. 128, 135.



cuit[28]—Perry insists that this standard applies in antitrust cases and is not "necessarily relevant in determining whether or not the McCarran Act acts as a bar" to TIL.

By adopting the decision of the District Court for the Northern District of Alabama in *Crawford v. American Title Ins. Co.*, 1975, 518 F.2d 217, 218, this Circuit established[29] the applicable standard for us to follow:

> The McCarran Act renders the federal [act] inapplicable when state legislation generally proscribes, permits or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision.

There is no doubt that Alabama has regulated the Fidelity conduct challenged here to a plainly sufficient degree to pass this test. The Alabama statute generally proscribes any act which the Commissioner deems to be unfair and deceptive and has clearly authorized enforce-

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[28] *Crawford v. American Title Ins. Co.*, 1975, 518 F.2d 217, 218.

[29] A year earlier, this Court in *Battle v. Liberty National Life Ins. Co.*, 1974, 493 F.2d 39, 51 n.12, specifically declined to decide what the appropriate standard should be:

> In determining whether there is state regulation of the insurance business, the courts have adopted varying points of view. In *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir., 1971), cert. den., 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972), the court stated that the requirement of state regulation under the McCarran Act is satisfied if the state has " 'generally authorized or permitted certain standards of conduct.' " *Id.* at 1182. The regulatory scheme was considered sufficient even though it may not have been enforced. In *Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80 (3 Cir. 1973), the court recognized the test set forth in the insurance rating case, but then found that the state regulation was more "aggressive" and encompassing. Because we disagree with the district court for other reasons specified above, we need not determine either the standard or the extent of insurance regulation in Alabama at this time.

ment through a scheme of administrative supervision. Regulations have been issued specifically with regard to the sale of life insurance policies to college students under premium financing arrangements. The Fidelity forms have been submitted and approved. In this connection, other courts have placed weight on state supervision of insurance company contracts and forms in determining whether the state was "regulating" the business of insurance for McCarran purposes. *Travelers Ins. Co. v. Blue Cross,* 3 Cir., 1973, 481 F.2d 80, 83, *cert. denied,* 414 U.S. 1093, 94 S.Ct. 724, 38 L.Ed.2d 550; *Pierucci v. Continental Casualty Co.,* W.D.Pa., 1976, 418 F.Supp. 704, 709. As detailed above, the Commissioner is empowered to remedy deceptive or unfair practices, not only through withdrawal of approval or disapproval of forms but by court action as well.

Perry basically urges us to hold that unless Alabama adopts the same requirements for insurance companies that TIL places on others, it is not "regulating" the business of insurance. But it is not for us to say in what precise manner that State should determine whether Fidelity's credit disclosure practices vis-a-vis its policyholders are unfair or deceptive. Alabama has undertaken supervision of the sale of life insurance policies to college students such as the one sold to Perry and has set the standards which it believes are necessary to protect Alabama insureds. McCarran's "regulating" requirement is thus satisfied.

*D. "Invalidate, Impair, Or Supersede"*

Again, I must take an issue not addressed by the Court. The District Court held that the application of TIL "to disclosure forms and statements which have been submitted to and approved by the Commissioner of Insurance . . . would allow the Federal Act to supersede state regulation of this aspect of the business of insurance, and invalidate



those state regulations which might be inconsistent with the Federal Act, *e. g.,* paragraphs 2, 5, and 6 of the guidelines. . . ." [30]

In attacking this holding, Perry strenuously urges that imposition of TIL requirements here would not result in a conflict between the state and federal laws. I construe this argument to mean essentially that supplementary TIL requirements can be imposed without invalidating, impairing, or superseding Alabama law. Apart from the fact that the same could be said about almost any law, I do not believe that "invalidate, impair, or supersede" means the mere absence of conflict. That term includes the displacement of, or the superimposition of federal requirements on, transactions that are tailored to meet state requirements. *Variable Annuities, supra,* 359 U.S. at 68, 79 S.Ct. at 620, 3 L.Ed.2d at 643.

For example, under the Alabama guidelines, ¶ 2 (note 22, *supra*), the insurance company is required to disclose "the amount of any down payment made to the agent at the time of the sale." Fidelity's form (note 2 of the Court's opinion *ante*) listed "Cash Downpayment." Perry's complaint alleged the failure to disclose in addition the "total downpayment" as required by § 226.8(c)(2) of Regulation Z.[31]

While I would concede that there would be no "conflict" in imposing § 226.8(c)(2)'s "total downpayment" disclosure rule here, I do not agree that such imposition would not invalidate, impair, or supersede the Alabama guidelines. I believe that the imposition of any additional requirements—whether conflicting or nonconflicting—would

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[30] The guidelines are set forth in note 22, *supra.*

[31] Perry made no payment, down- or otherwise, other than the $10 cash downpayment disclosed. Thus, even if Fidelity had "disclosed" to Perry the total downpayment, that amount would have remained $10.

impair or supersede Alabama's laws and regulations because that supplementation would take from the State the power to regulate exactly as it sees fit. And it would in turn repeal the McCarran Act by implication in a situation where Congress has not expressed its will to do so. I would be unwilling to judicially legislate additional, nonconflicting or conflicting TIL requirements onto Alabama's present specific regulation of the sale of life insurance policies under premium financing arrangements. To do so would render McCarran meaningless and impose "barrier[s] to the regulation . . . of [the insurance] business by the several States" in direct contravention of section 1 of the Act, 15 U.S.C.A. § 1011. If Perry believes that insurance companies who sell policies under premium financing arrangements should be subjected to the requirements of TIL, her proper resort is to Congress.

Finally, Perry argues that by enacting § 111 of TIL, 15 U.S.C.A. § 1610,[32] Congress intended an accommodation of state and federal law. While undoubtedly true, this contention completely overlooks the Congressional promise

[32] § 1610. Effect on other laws—Inconsistent provisions

(a) This subchapter does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter or regulations thereunder, and then only to the extent of the inconsistency.

State credit charge statutes

(b) This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.



contained in McCarran that it would speak out if a federal act passed under the Commerce Clause [33] was to apply to the business of insurance. In a similar vein, Perry urges that Alabama has not taken advantage of the total exemption afforded in 15 U.S.C.A. § 1633.[34] This position also ignores the clear intendment of the McCarran Act. I agree with the Seventh Circuit's rejection of the same contention raised in *Lowe v. Aarco-American, Inc.*, 7 Cir., 1976, 536 F.2d 1160.[35] If Alabama chooses to enact a law similar to TIL in order to qualify for credit transaction exemptions, it can do so. It can also regulate this aspect of the business of insurance in a manner which it thinks most suitable to protect Alabama policyholders. One has nothing to do with the other.

I would emphasize one thing. I have expressed my opinion here on a very narrow question. What the result might have been if Alabama did not require form approval or if the Insurance Commissioner had not issued guidelines specifically relating to the sale of life insurance policies to college students is a case which I do not address.[36]

[33] TIL was clearly enacted under the Commerce Clause. *Mourning* v. *Family Publications Service, Inc.*, 1973, 411 U.S. 356, 377, 93 S.Ct. 1652, 1665, 36 L.Ed.2d 318, 334.

[34] § 1633. Exemption for State-regulated transactions

The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.

[35] However, I do join the Court, *Cochran*, 606 F.2d at 465, *ante*, note 13, in rejecting the other holding of *Lowe v. Aarco-American*, 536 F.2d at 1162, that the McCarran Act applies when the transaction involves the insurance business, even if neither party is an insurance company.

[36] In the few cases that have involved McCarran Act defenses to TIL claims, once the courts have found that the particular

However, on the facts as they do exist, I would affirm the holding of the District Court that the McCarran Act does preclude application of TIL.

**Appendix**

*Excerpts From 91 Congressional Record January 25, 1945 (Senate)*

[1] At 479:

Mr. MURDOCK. I invite the Senator's attention to paragraph (b) of section 2 of the bill, reading as follows:

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

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activity is part of the business of insurance and that the state has regulated that activity, they have automatically found that application of TIL would invalidate, impair, or supersede state law. In *Gerlach, supra*, the Court seemed to hold that Florida's statutory control over the fixing of insurance rates was enough to trigger McCarran. In discussing an issue not before it—premium financing—the Court found that certain sections of the Florida statute set forth what disclosures were required to be made in a premium financing agreement. The Court stated: "It is immaterial that the regulation is not the same. What is controlling is that the regulation exists." 338 F.Supp. at 650.

In *Lowe v. Aarco-American, Inc.*, 7 Cir., 1976, 536 F.2d 1160, the Court of Appeals found that the credit sale of policies by an insurance broker and a premium finance company constitutes part of the business of insurance which Illinois regulated under its Insurance Code and the Premium Financing Companies Act. Relying on *Gerlach's* dictum, the Court held that application of TIL would supersede Illinois law on the same subject, namely, disclosure.

In *Ben v. General Motors Acceptance Corp.*, D.Colo., 1974, 374 F.Supp. 1199, the plaintiff brought a TIL claim against GMAC and its insurance subsidiaries. The Court stated that Colorado has "occupied the field of regulating the activities of insurance companies in a comprehensive manner". Again following *Gerlach*, it held that because TIL does not specifically relate to the business of insurance, it does not apply when the state has exercised its right to regulate and control that business. *Ben* can thus be read to stand for the proposition that mere general legislation in the field of insurance results in barring a TIL claim.



purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.

That part of the bill is applicable, is it not, to Federal statutes now in existence?

Mr. FERGUSON. That is the purpose of the section.

Mr. MURDOCK. It is also applicable, is it not, to any Federal statutes which may be enacted in the future?

Mr. FERGUSON. Yes; provided the statutes do not specifically relate to insurance.

Mr. MURDOCK. If the Senator will pardon me, I agree with him that the language affects only statutes the subject of which is insurance.

Mr. FERGUSON. Or specifically relating to insurance.

Mr. MURDOCK. Yes. But certainly that part of the bill to which I have referred would allow repeal by State legislatures of the Sherman Act so far as it relates to insurance unless the Congress of the United States should amend the Sherman Act so as to provide specifically either the repeal, invalidation, or impairment of such a State law.

Mr. FERGUSON. I appreciate the Senator has used the word "repeal." The bill would not go so far as to repeal the Sherman Act except as there would be a temporary repeal until the dates mentioned in the so-called moratorium section.

[2] At 480-81:

Mr. O'MAHONEY. Does the Senator from Michigan desire that the bill, if it shall be passed by this body, shall be interpreted anywhere as an intention of Congress to permit monopoly to be established in the insurance industry?

Mr. FERGUSON. No; by no means does the bill anticipate that any act would or should be passed which would create monopoly.

Mr. O'MAHONEY. Then, does the Senator believe that the bill as it now stands permits that interpretation?

Mr. FERGUSON. It would permit it. I understood the Senator from Wyoming to be familiar with the language on page 2, which was read by the able Senator from Utah, and I think the bill is broad enough to allow a State to pass a law allowing any agreement or contract other than those inhibited in paragraph (b) of section 4. But it is not the purpose of the bill at all to foster monopoly, or to anticipate that any act will be passed permitting or even encouraging monopoly. A State law relating to taxation, a law relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration.

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Mr. MURDOCK. The bill does not say what the Senator has indicated. What the bill says is that every act of Congress in existence now or which may be enacted in the future dealing with the question of insurance or the regulation of insurance shall not be construed—and that is pretty strong language—"to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides."



So we would do what? We would say to the State legislatures, "You can pass any law you desire with reference to insurance and the regulation thereof which does not involve agreements or acts of boycott, coercion, or intimidation, unless the Congress at some future date specifically repeals or invalidates your State law."

I wonder if the Congress of the United States wants to do that.

Mr. FERGUSON. The bill does not go as far as that.

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Mr. MURDOCK. My understanding of what the Senate Judiciary Committee wanted to do and what I hoped it would do was that we would by the enactment of a bill of this kind call the attention of the respective States of the Union to the fact that the Supreme Court of the United States had held that the business of insurance is commerce, and knowing that certain hardships were inevitable because of past practice and procedure, it was my intention, and I thought the intention of the Committee on the Judiciary, to say to the States, "For a certain period, long enough for you to take action, you will be allowed to make adjustments of your State laws to harmonize with the decision of the Supreme Court of the United States." But under the bill we would not do that. In my opinion, we would do exactly what the Senator from Wyoming implies we would do—that is, invite the respective State legislatures to pass acts which would permit agreements which would otherwise be in violation of the Sherman Act.

Mr. FERGUSON. Mr. President, I think an explanation of paragraph (b) of section 2 should be made at this time. The purpose of that provision is very clear, that Congress did not want at the present time to take upon itself the responsibility of interfering with the taxation of insurance or the regulation of insurance by the States. We were able to single out and to indicate that we had in mind three

acts of which we wanted to make exceptions, because they did not relate to insurance. I read from the bill:

Sec. 3. Nothing contained in the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

Now on page 3, and we find section 5:

Sec. 5. Nothing contained in this act shall be construed to affect in any manner the application to the business of insurance of the act of July 5, 1935, as amended, known as the National Labor Relations Act, or the act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.

Mr. MURDOCK. Will the Senator yield?

Mr. FERGUSON. Permit me a further word of explanation.

Mr. MURDOCK. Very well.

Mr. FERGUSON. If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because the Congress had not, under subdivision (b), said that the new law specifically applied to insurance. I think that makes the bill very clear.

[3] At 481:

Mr. RADCLIFFE. I hesitate to differ with the Senator from Utah [Mr. Murdock], but I want to call his attention



to a fact which is, of course, very obvious, that the difficulties of working out the insurance readjustment following the decision of the Supreme Court are colossal. I do not believe any one who does not come very closely in contact with the insurance business can realize that the decision by the Supreme Court to which reference has been made is one of the most far-reaching ever rendered by that Court. It means that an enormous business which, with the unqualified approval of the Federal Government, has operated for many years in a certain way, must now meet the new and fundamental conditions involved necessarily in any passage from State to Federal regulation. That does not involve merely one but a thousand-and-one different problems to be handled, many of them around the first of the present calendar year.

[4] At 481-82:

Mr. RADCLIFFE. Mr. President, I called the President's attention to the gravity of the situation and asked for a moratorium. His response was favorable, as it was later in answer to my letter of December 20. Of course, no one knows what legislation any State might try to pass. It might try to pass any sort of legislation, but it is extremely unlikely that any State, knowing that at the end of several years the moratorium provided for in this bill will come to an end, would try to run amok and pass any such law as the Senator from Utah suggests.

In subsection (b) there are several purposes contemplated. The insurance commissioners and many of the insurance companies have been in very great doubt as to how they could operate at this time with respect to matters of collection of premiums, general regulations, the issuing of licenses, and many other aspects of the business. Therefore, it seems very desirable that somewhere in this measure there should be a statement that the right of the States to regulate and to collect taxes should not be terminated or should not be repealed by implication. Otherwise, I

think the States may find themselves from time to time in a very serious situation in trying to function. Unless it is clearly stated somewhere that there is not a repeal by implication, such omission is likely to throw restraint upon or put serious hindrance in the way of the States functioning properly. In giving a moratorium to a business and to State governments harassed greatly by the effect of the decision of the Supreme Court, let us not do so begrudgingly or in a halfway fashion which might prove to be gravely insufficient to meet situations which we cannot today foresee.

[5] At 482-83:

Mr. FERGUSON. I should like to answer the question of the Senator from Maryland first. The language of section 2 answers the question:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

That is the insurance business. So the bill specifically provides that the State laws shall apply to taxation and regulation of insurance.

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Mr. MURDOCK. I wanted to make exactly the statement to the distinguished Senator from Maryland that the Senator from Michigan has made, and that is that nothing could be more emphatic or plainer than subsection (a) of section 2:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

When we go that far Congress expresses itself emphatically that the regulation of the insurance business should be under State law. But when we take the next step in subsection (b) it is an invitation, in my opinion, to do the



very thing that I, and I hope the Senator from Maryland, want to prohibit.

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Mr. RADCLIFFE. I agree with the Senator from Utah that the statement in subsection (a) of section 2 is quite definite and clear. But it has seemed to those who have been working upon this bill that there was some need or at least advisability that there should not be any repeal by implication. The statement beginning on page 1 is a general statement setting forth the purposes.

Since there seems to be doubt in the minds of certain people that there might be repeal by implication or that a general statement might have some crimping effect, it would not be at all unusual if a saving clause were put in the bill. It may not be necessary, but in the spirit of caution I think it might be desirable, especially knowing the very serious problems which have been confronting the insurance companies and the various States to leave them free to meet conditions some of which cannot now be foreseen. We want the companies to understand clearly and we desire the States to realize definitely that the States can go ahead and issue permits, collect taxes, and do the various other things which are necessary to be done. For that reason I think that full and unmistakable emphasis upon that right is essential. It is unnecessary and unwise to create any doubt as to the right of the States to go ahead and function freely in handling insurance.

Mr. FERGUSON. Mr. President, I agree that it should be very clear that the States can regulate and can tax insurance in all its phases. Section 2, in my humble judgment, is a very clear provision providing for such taxation and such regulation. The language of the bill makes clear the purpose of the legislation, that the taxation problem will be taken care of, and that there will be no excuse for paying under protest or not paying at all.

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Mr. FERGUSON.

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Today the various States have laws relating to insurance. It would be a physical impossibility to examine, in a short time, all those State laws and their ramifications. One State law provides that the insurance companies may fix rates subject to the approval of the insurance commissioner. Others provide that rates may be fixed if the Commission does not repeal them.

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Mr. O'MAHONEY. Does not subsection (a) of section 2 take complete account of that fact, and grant complete protection to existing State laws?

Mr. FERGUSON. I agree that, as to existing State laws, subsection (a) of Section 2 does so provide.

Mr. O'MAHONEY. Let me read it:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

That is complete.

Mr. FERGUSON. I think that is correct.

Mr. O'MAHONEY. There is no reason for misunderstanding on the part of any State official or any insurance company or any policyholder with respect to the meaning of that subsection as it applies to existing law.

Mr. FERGUSON. As it applies to existing law, that is correct. However, subsection (b) provides for something further. It provides that no Federal legislation relating to interstate commerce shall by implication repeal any existing State law unless such act of Congress specifically so provides.

Mr. O'MAHONEY. The Senator puts his finger upon the precise center of this dispute, or misunderstanding. Let



me say to the Senator, that, recognizing the complexity of this problem, and the desirability of maintaining State regulation and State taxation, members of the Judiciary Committee who were opposed to the proposal to grant a blanket exemption from the antitrust laws desired to go as far as was humanly possible in the direction of giving the States a clear-cut opportunity to adjust State laws in accordance with Supreme Court decisions and the antitrust laws.

It is no secret that Senate bill 12, introduced by the Senator from New Mexico [Mr. Hatch] and myself, and Senate bill 340, the bill which was reported by the committee, are modifications of a measure which was originally drafted by the legislative committee of the National Association of Insurance Commissioners. So there was an effort to work with those groups. In drafting those two bills we sought to spell out each particular law which might apply to insurance. We referred specifically to the Federal Trade Commission Act, the Robinson-Patman Act, the National Labor Relations Act, and the Fair Labor Standards Act. In other words, a good-faith attempt was made to specify every single law which had an application, or might have an application, to insurance.

Section 2(b) was drafted and written into the bill which I introduced, in the belief, not that it would be interpreted as an additional exemption from the anti-trust laws, but that it would be a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time.

[6] At 483-84:

Mr. BUSHFIELD. This whole controversy arose, Mr. President, because of the custom and practice, which had grown up in this country during a period of 75 years and which had been upheld by the courts of the country, of not

considering insurance to be commerce. The Supreme Court finally decided otherwise.

Subsection (b), which has been referred to in the present discussion, does not, it seems to me, relate at all to the learned remarks just made by the Senator from Wyoming.

The subsection reads in part as follows:

Sec. 2. (b) No act of Congress shall be construed to invalidate, impair, or supersede any law—

And so forth. The whole crux of the subsection is the word "construed."

The purpose of the framers of the bill, Mr. President, was to provide against a sudden adverse decision by some court in construing this Act or some State act thus throwing the business of insurance into confusion. The word "construed" is the whole crux of that particular subsection. I think to eliminate it would destroy the assurance given by the bill to the insurance business, and I would vote against eliminating it.

Mr. FERGUSON. Mr. President. I think it can fairly be stated that today absolute chaos exists in the insurance world, and it has been caused by the decision of the Supreme Court to which we have referred. The pending bill is an attempt to remove and dissipate that chaos by enacting a law by which the insurance companies will be able to abide for the time being.

As I said before, the State of North Carolina, which I am informed uses the revenue obtained from the taxation of such companies for the payment of pensions, has advised us that by February 15 of this year it will be compelled to suspend the licenses of certain insurance companies and all their agents to do business there because the companies have decided that under the present chaotic conditions they do not wish to pay the tax. They do not know whether they should or should not pay it. If subsection (b) is



deleted, I am of the opinion that we shall accomplish nothing by enacting the bill; because the insurance companies will still be unable to decide what they can or cannot do, and for that reason they will abide by the provisions of the State laws, and the present chaos will continue.

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The bill does not provide for repeal of the Clayton Act or of the Sherman Act, because if an attempt were made to repeal them, before they could again become effective it would become necessary to reenact them. So the language of the bill is such as to provide that they will be in full force and effect, except there will be a moratorium for a certain period. Thus there will be no necessity for the reenactment of those laws so as to make them apply to insurance in the future, unless Congress desires to do so by specific legislation.

[7] At 485-86:

Mr. REVERCOMB. Mr. President, I have listened with interest to the discussion concerning the amendment to paragraph (b) of section 2. It occurs to me that not only does the proposed act provide for a suspension of the Clayton Act and the Sherman Act, but the very purpose of it is to restore the control of the insurance business to the States. If we make the change proposed in this section and say "until January 1, 1948", then the bill in its completeness will end in 1948. The present provision is—and this was the measure reported unanimously by the Committee on the Judiciary—

No act of Congress—

Existing at this time, or passed before this, or to be passed in the future—

shall be construed to invalidate, impair, or supersede any law enacted by any State * * * unless such act specifically so provides.

I do not think there should be any limitation of time in the provision. We do not want the law to end on January 1, 1948. We want the business left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.

Therefore, I call to the attention of the able Senator from Michigan the fact that if the language suggested by him shall be written into the bill, this very section will become ineffective on January 1, 1948.

What is the danger of the language as written?

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Mr. REVERCOMB. . . .

What is the danger of the language as written, when it provides that no act of Congress shall be construed to invalidate a State law dealing with insurance unless the act of Congress specifically states that it is intended so to do? That saves the power of Congress. Why provide an automatic ending of this provision, if it is the intent of Congress today to leave to the States the conduct of the insurance business and the taxing of the insurance business, because if the States cannot control the companies, the States cannot tax them. The companies are refusing to pay taxes to the States, and that is one of the things which have brought forth this proposed law. Why provide an automatic termination upon a declaration of policy by fixing a date of termination?

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Mr. TAFT. The Senator's suggestion might be pertinent if it were not absolutely contradicted by section 4, which provides that on June 1, 1947, the Sherman Act shall again apply to the business of insurance. If we leave that provision in the bill, the one now being discussed is inconsistent with it, because if the Sherman Act applies to the business of insurance, any State law which authorizes a



rating bureau becomes invalid, or those engaged in the business are subject to Federal prosecution for complying with the State law.

Mr. REVERCOMB. The only two Federal laws mentioned are the Clayton Act and the Sherman Act, and the purpose of mentioning those specifically is to require the States so to enact legislation as not to violate those two existing laws. If any legislation is enacted in the future, whatever it may be—I cannot contemplate it today—if any law shall be enacted by the Congress on interstate commerce which could possibly affect the business of insurance and bring it within the general term "interstate commerce," it would apply. Why not let the provision stand that it shall not apply unless Congress specifically says in an act that it shall apply to the business of insurance, which we are now trying to return to the States?

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Mr. MURDOCK. If I understand the Senator correctly, he intends by the proposed act to bring about the repeal of the Sherman Act insofar as it applies to insurance.

Mr. REVERCOMB. No, if by "repeal" is meant specific repeal of the act. What we mean to do is to say to the States, "You can regulate insurance, but you cannot provide for anything that will violate the Sherman antitrust law or the Clayton Act, after the dates fixed in the bill, namely, 1947 and 1948.

Mr. MURDOCK. If the Senator will indulge me for a moment, if that is what the Senator intends, then certainly what has been called to his attention by the distinguished Senator from Ohio is applicable. What subsection (b) does, and what I object to, is that very thing. It permits the States to repeal the Sherman Act. The Senator does not want that, nor do I. What we do want to do is to grant the States a moratorium during which they can make their State laws conform to the Supreme Court decision, and

regulate insurance. But if we pass the proposed law with subsection (b) of section 2 in it, it not only refers to the existing laws of the Federal Government, but to all future laws of the Federal Government. What the Senator from Michigan proposes brings subsection (b) of section 2 in line with section 4, which follows, and grants what the distinguished Senator from West Virginia wants, if I understand him, that is, a moratorium until June 1, 1947.

Mr. REVERCOMB. As I see it, two things are proposed by this bill. Not only a moratorium with respect to the Sherman Act and the Clayton Act—and we all agree that that is its purpose—but it goes further than that, if I may say so to the able Senator, and carries out the purpose of giving power to the States of regulation of insurance and the taxing of insurance companies, so long as they do not get into conflict with a Federal law. The section before us provides that no act of Congress shall be construed to invalidate a State law unless the act of Congress specifically states that the State law is in conflict with the Federal act and is designed to override it.

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Mr. MURDOCK. Then it is applicable, it does apply, does it not, to the Sherman Act, and also to the Clayton Act, presently, because neither one of those acts specifically repeals or impairs or invalidates any State law?

Mr. REVERCOMB. I do not agree with that conclusion, because section 4 of the bill specifically says that the Clayton Act and the Sherman Act shall again be in force on the dates mentioned.

Mr. MURDOCK. That is what the Senator from Ohio called to the Senator's attention, that there is an inconsistency in the two sections, which is clarified by the amendment offered by the Senator from Michigan.

Mr. REVERCOMB. I do not think there is an inconsistency when they are read together. One says that no



act of Congress shall be construed to invalidate unless Congress specifically says that it shall invalidate. Section 4 provides specifically with respect to the Sherman Act and the Clayton Act. Subsection (b) of section 2 would apply to all other laws. Section 4(a) applies to the Sherman Act and the Clayton Act. I think the sections can be read together. But I wish to say to the Senator from Michigan that if he inserts the language "until January 1, 1948," as the time to which that section shall be in effect, he automatically terminates it at that time, and automatically terminates the control of the States over insurance.

[8] At 486:

Mr. TAFT. What bothers me about the amendment is that it implies that the measure may invalidate fees or taxes upon such business. The Senator might add at the end of section 4 "or to be construed to invalidate, impair, or supersede any law enacted by any State for the purpose", and so forth, during that period. The difficulty with the Senator's amendment is that it suggests at least that these two acts, even before 1947, although they do not apply to the business, might possibly invalidate a State law. I do not want the bill to carry that implication.

Mr. FERGUSON. Would the Senator explain again just where he would insert his proposal?

Mr. TAFT. At the end of section 4, line 22 on page 2, the Senator might add this language "or to be construed to invalidate, impair, or supersede any law enacted by any State", and so forth.

Mr. FERGUSON. Does the Senator feel that the words "shall not apply" are not as broad as the words now proposed by the Senator? We would use language to the effect that the Sherman Act shall not apply; we except it in subsection (b), and then we say it shall not apply. So if it does not apply, I do not see how we can say that it would interfere with the taxation or the regulation of insurance.

Mr. TAFT. Perhaps I am unduly concerned, but I am afraid the insurance companies which are doubting the validity of the taxes imposed upon them will not be greatly soothed by subsection (b) of section 2 as proposed to be amended by the Senator, because it excepts the two laws. I think we will then have to look to section 4.

Mr. FERGUSON. We eliminate everything from subsection (b) except two laws, and then we say in section 4 that those two laws shall not apply until certain dates. I think the language now is very clear as to what we mean.

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[9] At 487:

Mr. ELLENDER. . . .

I think the bill as reported by the Judiciary Committee is clear. I think all of us agree that the States should retain the right of regulating and taxing the insurance business within their respective borders.

*February 14, 1945 (House)*

[10] At 1087:

Mr. HANCOCK * * *

Under that decision insurance, if written by a company in more than one State, is, as matter of law, interstate commerce today and will be so until another Supreme Court comes along and reverses this decision. Therefore the taxes imposed on insurance companies in many States may be regarded as burdens on interstate commerce and, therefore, unlawful. As a result, many companies are refusing to pay their insurance taxes, that is, taxes on the insurance written within the several States. Others are paying taxes under protest, because they are threatened with stockholders' suits. The officials of an insurance company may not with impunity pay unlawful taxes. They are liable personally to their stockholders if they do so. Therefore it is imperative, if we are to preserve the rights of the States to tax the insurance companies on business written within their boundaries, that we pass an act authorizing them so to do. We have attempted to accomplish that purpose by sections 1 and 2 of the committee amendment to S. 340. I am not certain that we can do it but this bill goes as far as we can in an effort to maintain the rights of the States to tax the insurance business within their respective boundaries. A vast amount of State revenue is involved, and it is a matter of extreme importance to the States that action be taken to meet an immediate emergency.



[11] At 1089-90:

Mr. GWYNNE of Iowa. Mr. Speaker, when the Supreme Court last year decided the Southeastern Underwriters case it immediately made applicable to the business of insurance many laws that we have heretofore passed regulating interstate commerce. When we passed those acts, Congress did not have in mind insurance; as a matter of fact when Congress passed the Sherman Act it was with the distinct understanding that it did not apply to insurance, because insurance at that time was not interstate commerce, under Supreme Court decisions. The net result of the Supreme Court decision therefore was to put the Federal Government in the field of control then being exercised by the States. The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible until we can determine whether Congress will regulate insurance, or whether it will permit the States to regulate it.

I believe there is no substantial difference, no difference of consequence, between the bill passed by the Senate and the bill we now have before us. I intend to take up the amendments that have been discussed here a little later.

Before I do that let me say a word about H.R. 1973. It starts out with the statement that insurance shall be subject to State control. The Congress, of course, cannot delegate to the States the power to regulate insurance. What we are trying to do is to make it clear to the States and to the insurance companies that we are as far as possible removing ourselves from the field.

The second thing the bill states is that no act of Congress governing interstate commerce shall apply to insurance unless the act specifically so states.

[12] At 1090-91:

Mr. JENNINGS. In this day of promulgation of administrative law, in this day of judicial decisions which worm in and worm out and leave everybody in doubt as to whether the snake that made the crack was going in or backing out, it is a pretty good idea to keep things on the surface mighty clear, is that right?

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Mr. GWYNNE of Iowa. I cannot see any reason for putting in a bill the reasons why we are writing the bill, and that is all that amounts to. We give them a moratorium. Why should we undertake to tell the States anything beyond that fact? If they want to revamp their laws during the period of moratorium, that is up to them. Why should we express the hope that they will write other laws to conform with the notions of some Members of Congress?

Mr. ANDERSON of New Mexico. The gentleman understands the Attorney General has the duty to prosecute these people; but he says, "I shall not do it, provided you get your house in order."

Mr. GWYNNE of Iowa. The Attorney General has no business advising the States what kind of laws they should enact; neither do we.

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Mr. GWYNNE of Iowa. That is true. There are two limitations as far as the States are concerned when they tax insurance companies. One is the Constitution. I am afraid some of the taxing policies of some of the States will have to be revamped, because they are probably unreasonably impeding interstate commerce. We cannot do anything about that, of course. The other limitation of the right of the States to tax insurance companies would arise if Congress itself would move into the field. In this bill we are making it clear that we do not move into the field.

[13] At 1092:

Mr. SPRINGER. This bill provides a moratorium. That is the important feature contained in this bill. Everyone knows that great consternation developed following the decision in the case of the United States against Southeastern Underwriters Association, et al. The States did not know what to do following that decision, and the insurance companies certainly did not know what to do. The question of taxation was involved, and the question of the control and regulation of insurance companies by the several States was also involved. At the present moment, unless this measure, or similar legislation, is passed to protect the States and protect the insurance companies with regard to their control and the question of taxation, utter confusion will result and utter chaos will reign in the several States.

My thought has been, as has been stated on the floor of the House by others, that I would far prefer to take the question of insurance entirely out of the commerce clause of the Constitution and entirely away from any Government control. But this emergency is immediate and it is necessary to pass this legislation now. The States do not know what to do with respect to the collection of taxes and the insurance companies do not know what to do with

respect to the payment of taxes. The several States have no charted course with respect to the control or the regulation of insurance companies, since the case above cited, has been decided. Confusion and chaos has been brought about by that very peculiar decision.

Mr. Speaker, since this measure has been pending many insurance companies, and many State state officers, have written to me respecting that resulting confusion. It is essential that this measure be passed promptly in order to avoid confusion in the future.

This measure seeks only to establish a moratorium until January 1948 in order that the several States may continue their control and regulations over the insurance business and to proceed with the collection of taxes, in the manner and form intended by Congress. At the end of that period I hope—and I am confident a majority of the Members also hope—that this matter may be worked out in a proper manner—preserving to the several States their rights to control and regulate the insurance business within such States, and to collect the taxes now permitted—all without Government interference. I intend to support the measure.

*February 26, 1945 (Senate)*

[14] At 1442:

Mr. ELLENDER. At the end of the 3-year period will the taxing and regulatory powers of the States be in anywise affected should the Congress not take any action at all?

Mr. McCARRAN. No; they will not be affected.

[15] At 1443:

Mr. McCARRAN. . . .

During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Antitrust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948 the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.



[16] At 1443-44:

Mr. O'MAHONEY. I believe the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. The bill says if the States have regulated.

Mr. FERGUSON. I had reference to legislation dealing with regulation and taxes.

Mr. O'MAHONEY. The bill attempts to provide for a moratorium. I ask for the attention of the Senator from Florida in order that I may give him my interpretation of the bill.

While the Southeastern Underwriters case was pending in the Supreme Court an effort was made to deprive the court of jurisdiction by passing a bill which, in effect, provided that the Sherman and the Clayton Acts should not apply to the business of insurance in any way, shape, or form.

Mr. PEPPER. Knowing how actively the insurance companies of my State fought me because I opposed the bill, I should remember it.

Mr. O'MAHONEY. That bill was not enacted. The pending bill provides for a moratorium. It contains a declaration that for a period of time the Sherman and Clayton Acts, as well as the other acts, shall not apply.

Section 4 specifically declares that the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act shall apply. Nothing in the proposed act shall be construed to affect their application. In other words, there is a positive declaration that these three specific Federal laws which were enacted by Congress to apply to commerce apply also to insurance.

Then we have a clear recommendation of the principle of the Supreme Court decision in the Southeastern Underwriters case.

Now with respect to the section to which the Senator himself refers, it follows the declaration in the very first section that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest." So now we endeavor to convey that power of regulation to the States —to recognize it, I should say, rather than convey it—to recognize as desirable the regulation.

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Mr. PEPPER. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Antitrust Act and the Clayton Act?

Mr. O'MAHONEY. I think the answer to that question will be clear when I point out that there are certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law, which prohibits combinations and agreements in restraint of trade.

Mr. PEPPER. Would it not be better that those agreements, if there are such that are legitimized, be identified in the statute?

Mr. O'MAHONEY. I quite agree with the Senator, and I endeavored to the very best of my ability to induce the committees of Congress to write into the law specific



exemptions from the antitrust law, but I was unable to prevail in the Committee on the Judiciary and I was unable to prevail on the floor of the Senate. But now we have this declaration that with respect to these particular acts, the Sherman Act, the Clayton Act, the Federal Trade Commission Act, no act of Congress shall be construed to invalidate the law of any State passed for the regulation or the taxing of the business of insurance, and then the proviso.

Mr. PEPPER. Will the Senator read the proviso?

Mr. O'MAHONEY. It provides that after January 1, 1948, these several acts—

Mr. PEPPER. That is, the Sherman Act and the Clayton Act.

Mr. O'MAHONEY. Yes. They "shall be applicable"—there is a positive declaration—"to the business of insurance to the extent that such business is not regulated by State law," as was stated by one of the House Members of the conference committee. I interpret that to be a clear statement that if the States do not regulate, the power of Congress to regulate is clearly enunciated. I do not conceive this to be a grant of power to the States to authorize by permissive legislation obviously adverse combinations which would be against the public interest.

Mr. PEPPER. Am I correct in saying that under the proviso which the Senator has just read, if a State made it an offense, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply to combinations and restraints of trade by companies engaged in business in that State? Is not that what it means?

Mr. O'MAHONEY. No; I think that, for example, a rating bureau, formerly agreement among insurance companies, under the supervision and regulation of the State, would be permitted.

Mr. PEPPER. That may relate to the getting together and filing of proper data and obtaining certain statistical information and disseminating it, and all that, but the legal effect of the proviso which the Senator has just read is that a State can absolutely prevent the applicability of the Sherman Antitrust Act and the Clayton Act to insurance companies doing business in the State by passing a State act which will make combinations and restraints of trade unlawful in that State. As a practical matter, we know that the States cannot and will not enforce these laws against these insurance companies.

Mr. WHITE. Mr. President, is it not perfectly clear that the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation? As I take it, there are two jurisdictions.

Mr. McCARRAN. There always are.

Mr. WHITE. There is the State, authorized to act to whatever extent seems proper.

Mr. McCARRAN. That is correct.

Mr. WHITE. Then the Federal Government can come in, and it does come in and may legislate beyond the limit of the State legislation.

Mr. McCARRAN. To the extent that the State does not regulate.

Mr. WHITE. To the extent that the State does not regulate.

Mr. MURDOCK. Mr. President, does the Senator from Maine take the position that, under the conference report it becomes necessary for the Congress to act again affirmatively, subsequent to any State action taken?

Mr. WHITE. Not at all; that is not my view of the matter at all. My view is that the State may regulate. If,



however, the State goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.

Mr. McCARRAN. That is a correct statement.

Mr. MURDOCK. Without any subsequent action on the part of Congress?

Mr. WHITE. Without any subsequent action on the part of Congress.

Mr. MURDOCK. I think that therein lies a very important feature of this whole matter. I agree thoroughly with the Senator from Maine that insofar as the States step into the picture affirmatively and act by regulation, they may do so. As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. Insofar as they fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again.

Mr. BARKLEY. Mr. President, will the Senator yield?

Mr. McCARRAN. I yield.

Mr. BARKLEY. I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?

Mr. McCARRAN. That is my interpretation.

*February 27, 1945 (Senate)*

[17] At 1478:

Mr. McCARRAN. The Senator undoubtedly recognizes the fact that the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate. The Senator will agree with that statement, will he not?

Mr. PEPPER. On the contrary, Mr. President, I may say that I am not willing to leave the applicability and the effectiveness of the Sherman Act and the Clayton Act to the decision of a State legislature. By doing so the Congress would be abrogating its power with respect to the subject exclusively to the several legislatures, that is, if we pass this law without imposing any limitation upon the States in the exercise of their regulatory power that it must be not inconsistent with the Clayton Act or the Sherman Act.

Mr. McCARRAN. Under the provisions of the section in the conference report to which the Senator addresses himself, the States are advised and warned that they have a moratorium of 3 years during which they may bring themselves into compliance by way of regulation. If at the end of the 3 years they have not brought themselves into compliance, if they have not regulated the business of insurance, then they must take the consequences because after that period is over the Sherman Act and the Clayton Act and the other acts become immediately again in force as regards the business of insurance. That is all there is to that provision.

[18] At 1480:

Mr. PEPPER: * * *

But if we say—which we do say by the language, in my humble opinion—that if they preempt this field by regulating it by State legislation, then the Federal act shall not apply; there is not anything to prosecute. There is not any



juridical question that is raised. We have then given them carte blanche to legislate on anything they want to, and have said that if they regulate, then we withdraw from the field to the extent that they have covered it, and if we legitimize a rate they have fixed in practice can anybody deny that they have covered the subject, that they have regulated the field, and that they have occupied the domain? If they have, then we have by our own act provided that the Sherman Act or the Clayton Act shall not have any effect in a case of that sort.

* * * * * * * * * *

A State has the right, without any legislation, to regulate anything pertaining to the insurance business, and to the extent that it regulates it has legitimized in its regulations so far as these Federal acts are concerned, and by the proposed legislation we would give them the right to go as far toward cutting down or toward emasculating the Sherman Act and the Clayton Act as they choose to go. . . .

[19] At 1481:

Mr. FERGUSON. Under the language which is now in the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions:

Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate. But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the

Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we intended to do. After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business. But we spelled out certain things on which we thought Congress should not allow the States to legislate. Those are the things which I have mentioned. As to the others, the State has full power to act by legislation—not by agreement but by legislative act. The Senator from Florida was talking about an agreement which related to many States. This bill would not permit such an agreement, because no State law could allow a monopoly to exist outside the State.

Mr. PEPPER. I thank the able Senator for his clarity and candor. Let me ask the Senator a question. Suppose the State of Florida, through its legislature, were to provide that insurance companies may belong to a rating bureau, the headquarters of which is in Atlanta, and that such rating bureau may be the instrumentality through which rates are fixed, and that those rates, when fixed, shall be applicable within the State of Florida. Would the State legislature have authority to do that under the language to which I am addressing myself?

Mr. FERGUSON. This bill would permit—and I think it is fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses.



The sale of insurance is not the same as the sale of an article in a store. When one buys an article in a store, he brings it home with him. In the case of insurance, he buys a promise to pay upon the happening of a certain event, and that event may be the burning of his home. If the company is not sound and solvent at the time the house burns, or at the time claim is made, there is no insurance at all. That is what we have tried to avoid.

Mr. PEPPER. In other words, the Senator believes in a form of rate fixing?

Mr. FERGUSON. Yes. There is no doubt that the bill allows it; but we believe that all the wisdom is not here in Congress. We believe that there is some wisdom left in the legislatures of the various States, and that they should exercise their judgment and regulate insurance, except in the respects which we have enumerated.

[20] At 1483:

Mr. O'MAHONEY. Mr. President, there is not a line or sentence in the proposed act, as I have read it, which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States. The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce, but, wisely, it seems to me, undertakes to say in effect to the State, "For this period take the responsibility and regulate insurance in the interest of the public."

[21] At 1486-87:

Mr. BARKLEY. What I am anxious about is to know that I, as a Senator, will not be estopped in the future from voting upon any legislation regulating insurance, which has been declared to be interstate commerce, and which I have always believed to be interstate commerce. If I vote for this conference report, I am not estopped, as a Senator,

from voting for any law which may be under consideration hereafter by Congress dealing with insurance, to the extent that any State authority does not touch the subject, or, if it touches it, does not deal adequately with it.

Mr. O'MAHONEY. In response to the Senator's question, let me say that one of the House conferees, in the course of the conference, used this sentence, which I thought was extremely apt: "This is a bill to authorize the States to regulate the insurance business; and if the States do not regulate it, the Federal Government can."

[22] At 1487:

Mr. FERGUSON. I think it should be added in reply to the Senator from Kentucky [Mr. Barkley] that there is no attempt here to have Congress throttled in the future in acting upon insurance legislation. Subsection (b) of section 2 provides that if Congress does act, the act shall specifically relate to the business of insurance.

Mr. O'MAHONEY. That is correct.

Mr. FERGUSON. What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law.

Mr. O'MAHONEY. In other words, no existing law and no future law should, by mere implication, be applied to the business of insurance.

Mr. FERGUSON. That is correct.

Mr. O'MAHONEY. That was the understanding.

Mr. FERGUSON. In other words, we would not repeal this law by implication.



[23] At 1487-88:

Mr. BARKLEY. * * *

I have been somewhat disturbed by the provision in subsection (b) of section 2 of the conference report. However, I think that under the interpretation given it by the conferees my doubts have been resolved, and I intend to vote for approval of the conference report. But I wish it to be understood that in voting for approval of the conference report I am accepting the interpretation placed upon it by the conferees, namely, that if any State, through its legislature, undertakes to go through the form of regulation merely in order to put insurance companies within that State on an island of safety from congressional regulation, that effort will be futile, and not only can Congress deal with any phase of the insurance business not dealt with by a State legislature, but even in a case in which a State legislature deals with any phase of it, but does not deal with it adequately in the opinion of Congress, Congress is not in any way barred by the conference report from dealing with that subject and with the phase of it which Congress deems to have been inadequately dealt with by the State; so that hereafter we can enact such legislation as we may deem proper and wise to have enacted in connection with the regulation of this business, which clearly is interstate commerce.

[24] At 1488:

Mr. RADCLIFFE. If we do not enact any legislation at this time, the situation will be a very serious one. The State insurance commissioners do not know what to do. For instance, they do not know whether they can collect taxes or issue permits. The insurance companies do not know whether they can pay taxes. The insurance commissioners do not know whether they can issue regulations. The entire operation of the insurance business is now in more or less a chaotic condition due to uncertainties which require immediate legislative action. We must have some legislation at the earliest possible moment.

Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1290

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COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY,
*Petitioner,*

v.

JESSIE CODY, SALLIE MAE CODY, and all others similarly situated,
*Respondents.*

COMMUNITY LOAN & INVESTMENT CORPORATION OF AUGUSTA,
*Petitioner,*

v.

JAMES TOUCHSTONE, GLENDA TOUCHSTONE, INEZ SINGLETON, and all others similarly situated,
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## RESPONDENTS' BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

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The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 606 F.2d 499.



## QUESTIONS PRESENTED

Respondents are dissatisfied with petitioners' phrasing of the "Questions Presented".[1] The respondents recast those questions as follows:

1. Whether in Georgia, the McCarran-Ferguson Act is a bar to requirements of the Truth-in-Lending Act, where the financing and sales of cancer insurance policies to loan customers are handled by loan managers in their dual capacities as employees of the loan company and licensed agents of an insurance company.

2. Whether a loan company is required to make Truth-in-Lending "credit sale" disclosures for the financing and sales of cancer insurance policies by its loan managers.

3. Whether the Truth-in-Lending Act's pre-October-1974-penalty provisions authorize more than one penalty award on a single credit transaction involving multiple obligors in a class action.

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1 See Petition at 2-3.

## STATUTES INVOLVED

The plaintiffs accept Community's statement of "Statutes Involved", and will refer to the text of the statutes and regulations by reference to the Appendices accompanying Community's petition, by the designation: "A". The plaintiffs add to the statutes and regulations in Community's appendices 15 U.S.C. §1640(a), as amended. The text of 15 U.S.C. §1640(a), as amended in 1974 and 1976, is set out in full below:

> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person is an amount equal to the sum of --
> (1) any actual damage sustained by such person as a result of the failure;
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under Chapter 5 of this title, 25 per centum of the



> total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.
> In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of

compliance was intentional.
As amended Pub. L. 93-495, Title IV, §§406, 407, 408 (a)-(d), Oct. 28, 1974, 88 Stat. 1518; Pub. L. 94-222, §3(b), Feb. 27, 1976, 90 Stat. 197; Pub. L. 94-240, §4, Mar. 23, 1976, 90 Stat. 260.

## STATEMENT OF THE CASE

The respondents are dissatisfied with the petitioners' "Statement of the Case" because of certain misleading statements and because the salient facts were omitted.

By stipulation of the parties, this case was submitted as though it had been tried to the court without a jury. The district court made Findings of Fact (A. C), none of which has ever been enumerated as error. The Fifth Circuit, in its opinion in this case, presented a "Factual Background" based on the district court findings. Cody, 606 F.2d at 501-502 (A. 40a-42a)

The following "Statement of the Case" consists of the "Factual Background" by the Fifth Circuit, in addition to one paragraph from the petitioners' "Statement of the Case".



### Factual Background

Community Loan Corporation of Richmond County and Community Loan & Investment Corporation of Augusta (hereinafter "Community") are separately incorporated but share the same officers and board of directors. They are wholly-owned subsidiaries of Aristar, Inc., the parent corporation of a financial conglomerate that operates more than 400 loan offices in 26 states and owns the Diamond State Life Insurance Company and the Diamond State Agency. Community is a lender licensed under the Georgia Industrial Loan Act, Ga.Code Ann. §§ 25-301 *et seq.*

In 1972 Aristar developed a program to offer cancer insurance for sale in the loan offices of its subsidiaries. This insurance was to be issued by American Family Life Assurance Company and was to be offered in addition to the credit life, accident and health, and property insurance customarily written in connection with loan transactions.[2] The annual premium—$40 on an individual policy, $60 on a family policy—was to be paid by Community to American Family out of the proceeds of the loan. Pursuant to a brokerage agreement between American and Diamond State Agency, for each cancer policy sold in the loan office, 50% of the premium would be returned in the form of a sales commission to Diamond State Agency. Of that amount, $10 or $12 would be disbursed to the loan manager who sold the insurance policy and $2 or $5 to his district supervisor. Diamond State Agency also received a $2 application fee and a $2.40 credit toward the purchase of American Family stock for each cancer policy sold.

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[2] Aristar officials recognized that their small loan customers were a potential "captive market," Record at 191, and one memorandum projects an annual gross of more than $1.5 million. *Id.* at 188.

Despite some initial qualms about selling these "CancerCare" policies,[3] Aristar and Community decided to implement the sales program on an experimental basis in Georgia and South Carolina. The program was arranged by Diamond State Life Insurance Company and American Family, with Diamond State to oversee the licensing of Community's loan managers and to ensure compliance with state insurance regulations. Community's loan managers eventually became licensed insurance agents of American Family, and the Georgia sales program was instituted in January 1973. The South Carolina program never got off the ground, apparently because of licensing difficulties.

The program was temporarily halted in April 1973, apparently because of the sales techniques of some overzealous loan managers who added the price of the cancer policy to the loan without the borrower's knowledge or consent. Internal correspondence indicates attempts to correct this practice,[4] and the sales program was reinstated in July. However, it was terminated in early 1974.

Plaintiffs Jessie and Sallie Mae Cody, James and Glenda Touchstone, and Inez Singleton were Community customers who applied for loans in February and March 1973. While

---

[3] Some Aristar officials feared customer dissatisfaction because of the policy's limited benfits. The company was also aware that many states prohibit the sale of cancer insurance.

[4] For example, a Community vice-president wrote certain Georgia supervisors on March 20, 1973, about cancer insurance sales. The letter reads in pertinent part:

> We have been advised by Mr. Beck with American Family Life Assurance Company of Columbus (CANCER CARE) that his company is receiving complaints from our customers.
>
> It seems we are guilty of not selling the policies, but instead are adding them on the loan without the customer's knowledge or consent.
>
> THIS PRACTICE MUST BE STOPPED IMMEDIATELY. We must have the customer's consent, and he must be aware of the cost, benefits, and amount of yearly premiums.

R. at 221.



handling the loan applications, Community's loan managers, acting as agents of American Family, sold the plaintiffs CancerCare policies. Each plaintiff signed a loan contract and a separate application for cancer insurance, although the record strongly suggests that they did not know they were purchasing the cancer insurance. The first year's premium was deducted from the loan proceeds and was indicated as a disbursement to the customer and American Family. Community then issued checks payable to American Family and the customer, and the insurance applications and checks were forwarded to American Family for approval and issuance of the policies.

The plaintiffs brought suit on behalf of themselves and others similarly situated, alleging violations of TIL's credit sale disclosure requirements, 15 U.S.C. § 1638(a); 12 C.F.R. § 226.8(c). They sought the statutory penalty and attorneys' fees allowed under 15 U.S.C. § 1640(a). The district court certified the cases as class actions and, by stipulation of the parties, they were submitted as though they had been tried to the court without a jury. The court ultimately entered judgment for plaintiffs, and Community appealed.

Upon appeal to the Fifth Circuit Court of Appeals, this case was consolidated for argument with two similar cases, *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), and *Perry* v. *Fidelity Union Life Insurance Co.*, 606 F.2d 468 (5th Cir. 1979). The opinions in the three cases appear in sequence in the Federal Reporter, all having been decided by the same three-judge panel on the same day. Chief Judge Brown concurred in the result in *Cochran*, but dissented in *Perry* and in this case. The opinions of the court of appeals in *Cochran* and *Perry* are printed as Appendices P and Q, respectively.

## REASONS FOR DENYING THE WRIT

I. THE McCARRAN-FERGUSON ACT (MFA) ISSUE.

The McCarran-Ferguson Act (MFA) question on which Community is seeking certiorari is the meaning of the phrase "business of insurance" in §2(b) of that Act. (Pet. 2; A. G) The three reasons proffered by Community in support of this request are: One, this case created an intercircuit conflict on the issue. (Pet. 6) Two, the Fifth Circuit's decision was incorrect, having misapplied this Court's prior decision(s). (Pet. 7) And three, the issue is significant. (Pet. 19)

The plaintiffs will show below that certiorari should be denied.

A. Any Intercircuit Conflict Created By This Decision On The Meaning Of The Phrase "Business Of Insurance" Is Not A Basis For Granting Certiorari Since, Subsequent Thereto, This Court Rendered Its Opinion On That Issue.



In 1976, the Seventh Circuit ruled that the phrase "business of insurance" in the MFA included the Truth-in-Lending (TIL) type of disclosures required to be made in the consumer financing of the sale of insurance policies. Lowe v. Aarco-American, Inc., 536 F.2d 1167 (7th Cir. 1976) The Lowe court attributed an expansive meaning to the phrase "business of insurance".

In early January of 1979, the Fifth Circuit ruled on the meaning of the phrase "business of insurance" in the MFA. This was done in three TIL cases which had been consolidated for argument. These three cases are: Cochran v. Paco, Inc., 606 F.2d 460 (5th Cir. 1979) (A. P); Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468 (5th Cir. 1979) (A. Q); and the instant case, Cody v. Community Loan Corporation, 606 F.2d 499 (5th Cir. 1979) (A. O). The Federal Reserve Board filed an amicus brief in the Perry and Cochran cases, arguing that the financing of insurance premiums was not the "business of insurance".

The Fifth Circuit, contrary to the Seventh Circuit Lowe case, held that the financing of cancer insurance premiums by a loan company is activity "purely ancil-

lary to the insurance relationship between the insurance company and the policyholder" and therefore not the "business of insurance" as that term is used in the MFA. Cody, 606 F.2d at 503 (A. 44a)

The analyses for these three Fifth Circuit decisions were developed in the Perry and Cochran opinions. Both of these opinions relied on the 1977-Fifth-Circuit-MFA case of Royal Drug Co. v. Group Life & Health Ins. Co., 556 F.2d 1375 (5th Cir. 1977). Perry, 606 F.2d at 470 (A. 171a-172a); Cochran, 606 F.2d at 467 (A. 164a-165a)

The Fifth Circuit Royal Drug case had held that "an activity is not a part of the business of insurance solely because it has an impact, favorable or otherwise, upon premiums charged by the insurer". (556 F.2d at 1386) That case further held that "business activities of insurance companies not peculiar to the insurance industry are outside the scope of the McCarran Act". 556 F.2d at 1386

These Fifth Circuit cases--Perry, Cochran, Cody and Royal Drug--placed a narrower meaning on the phrase "business of insurance" than did the Seventh Circuit Lowe case.



Well before the issuance of the Fifth Circuit decisions in Perry, Cochran and Cody, this Court had granted certiorari in the Fifth Circuit Royal Drug case because of intercircuit conflicts as to the meaning of the phrase 'business of insurance' in §2(b) of the Act". Group Life & Health Ins. Co. v. Royal Drug Co., Inc., 440 U.S. 205, 208 (1979) ("Royal Drug") Within two months of the issuance of the Fifth Circuit Cody, Perry and Cochran decisions, this Court rendered its opinion affirming the Fifth Circuit Royal Drug decision. 440 U.S. 205

Accordingly, Community's request for certiorari because of an intercircuit conflict between Cody and Lowe is not a basis for granting certiorari, since: 1) there is no longer an intercircuit conflict, 2) further guidance on the meaning of the phrase "business of insurance" by this Court would be untimely, and 3) the issue presented is not of sufficient importance.

1. No longer an intercircuit conflict. This Court's opinion in Royal Drug applied a narrower meaning to the phrase "business of insurance" than was applied in the Seventh Circuit Lowe case. (440 U.S. at 211, 215-216) The instant case, however, is in

accord with this Court's Royal Drug opinion.

In light of the above, the Seventh Circuit Lowe decision no longer has vitality as a case creating an intercircuit conflict on the meaning of the phrase "business of insurance".

2. Further guidance on the meaning of the phrase "business of insurance" by this Court in the instant case would be untimely. Any further guidance by this Court on the meaning of the phrase "business of insurance" should await the refinements of arguments and authorities by post-Royal Drug district and circuit courts.

Not only would review be untimely because of this Court's intervening Royal Drug decision, it would be premature as a general matter. This is so because the only intercircuit conflict asserted by Community is between two circuits: the Fifth and Seventh. This Court should await the decision of other circuits.

For these reasons, this court should allow the issue--assuming arguendo, that an "issue" remains after Royal Drug--to ripen.

3. The issue presented is not of sufficent importance for this Court to grant certiorari. To the extent that guidance



on the meaning of the phrase "business of insurance" is important to the overall structure of the law, the principles set out in this Court's Royal Drug opinion addressed that need. Any application by this Court of those principles to the highly peculiar facts of the instant case would do little toward that end. And, since Community has terminated its cancer insurance financing (A. 21a), even a reversal would provide only limited benefits to it.

B. The Fifth Circuit Properly Applied The Applicable Decisions Of This Court.

As part "II" of its "Reasons For Granting The Writ", Community argues the merits, contending that the Fifth Circuit decision misapplied this Court's decision in SEC v. National Securities, Inc., 393 U.S. 453 (1969) (Pet. 7).

Community's summary of the purported misapplication of National Securities is: "the first inquiry that the lower court should have made is whether the state laws on which Community relied were 'enacted... for the purpose of regulating the business of insurance'". (Pet. 10)

1. The "first inquiry" in National Securities presented the question put by the

Fifth Circuit in the instant case: "Whether the activity in question is the 'business of insurance'". Community has misstated the "first inquiry" in the National Securities case. In National Securities, this Court stated:

> The first question posed by this case is whether the relevant Arizona statute is a "law enacted ... for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act".

393 U.S. at 457 (emphasis added)

The "first inquiry" in National Securities was couched in terms of a "relevant" statute. To be a "relevant" state statute, the state must regulate the particular activity in question. Arizona had passed a comprehensive insurance code, but the only "relevant" portions in National Securities were the portions which applied to the particular activity in question. (393 U.S. at 460) This Court, in National Securities, also referred to such a "relevant" statute as an "applicable" statute. 393 U.S. at 462

In the instant case, there is no "relevant" or "applicable" statute.



Community has never contended that the Georgia Insurance Code or regulations (A. K-O) govern the financing of insurance premiums. Nor has Community contended that those laws govern TIL-type disclosures. In fact, Community concedes that the only Georgia statute or regulation governing premium financing--the Georgia Insurance Premium Finance Company Act (A. J)--has no application to the transactions in the instant case, since the statute not only fails to apply to insurers authorized to do business in Georgia, it does not even cover the type of insurance in this case: ordinary cancer insurance. (Pet.10 n.6)

2. The activity in question in the instant case is not the "business of insurance". The activity in question in the instant case was the financing of the premiums for the sale of cancer insurance. This financing was handled by the loan managers of the loan company. These loan managers had a dual capacity. One capacity included handling the financing of practically any consumer goods that a borrower might purchase. In this capacity, the loan manager was acting on behalf of the loan company as an extender of credit.

The cancer insurance company was not involved in the extension of credit by the loan company. Cody, 606 F.2d at 501, 503 (A. 40a-44a)

This financing activity by the loan company did not involve any "underwriting or spreading of risk". (Royal Drug, 440 U.S. at 211,214) Such underwriting and spreading of risk is the "core" of the "business of insurance" to which the MFA applies. (National Securities, 393 U.S. at 406) Nor does such financing activity "relate so closely to the [insurance companies'] status as reliable insurers" as to be within the "business of insurance" under the MFA. (National Securities, 393 U.S. at 458; Royal Drug, 440 U.S. at 215-217) Furthermore, since the financing relationship was not between the insurance company and the policyholder, the MFA is inapplicable. Royal Drug, 440 U.S. at 215-216; Cochran, 606 F.2d at 467 (A. 165a); for the express concurrence by Judge Brown see Perry, 606 F.2d at 484 n.35 (A. 201a n.35)

II. THE TRUTH-IN-LENDING ACT (TILA) ISSUES.

Community seeks certiorari on two Truth-in-Lending (TIL) issues.



A. The TIL "Credit Sale" Issue.

The first TIL issue upon which Community is seeking certiorari is: Whether the Fifth Circuit erred in holding that "credit sale" disclosures were required. (Pet.2-3)

The two reasons proffered by Community in support of its request for certiorari on this issue are: One, the Court of Appeals' decision overlooked a specific provision of Regulation Z of the Federal Reserve Board. (Pet. 15) Two, the issue is significant. (Pet. 19, 20)

The plaintiffs will show below that certiorari should be denied.

1. The Court of Appeals' decision did not overlook a specific provision of Reg. Z. Community argues that the Fifth Circuit overlooked a specific provision of Reg. Z in deciding the instant case. (Pet. 15) In particular, Community points out that it made the following disclosure on the loan document:

> Check payable to American Family Life Insurance Comp.....$60.00

(Pet. 15)

From this, Community makes a two-step argument: First, that this disclosure was in compliance with the disclosures required for loans under 12 C.F.R. §226.8(d)

(1) of Reg. Z. (A. 84a) Second, that for the Fifth Circuit to have held Community liable for violation of TIL, it must have "overlooked" §226.8(d)(1) of Reg. Z.

Community is incorrect. To the contrary, the Fifth Circuit expressly assumed that Community complied with all loan disclosure requirements, including §226.8(d)(1) of Reg. Z. (Cody, 606 F.2d at 502 n.6, 503) (A. 42a n.6,44a) Therefore, there is no basis for granting certiorari on this TIL issue.

2. A decision by this Court on the unique "credit sale" issue presented in this case would not add significantly to the body of TIL law and is not ripe for decision. This case involves a complex fact pattern which gave rise to a scheme under which Community merchandised policies of cancer insurance to an unsophisticated, unsuspecting class of consumers. Community, the petitioning loan company, had a captive market with its small loan customers. Not being content to accept the high rates of interest, fees and credit insurance premiums allowed under the Georgia Industrial Loan Act (Ga. Code §25-301 et seq.), Community devised yet one more method to exact even



higher charges from its customers: the credit sale of an ordinary cancer insurance policy. This highly unusual practice was successful as to the named plaintiffs, because the cost of the cancer insurance policy was hidden among all the other disbursements made by Community on loan disclosures. Cody, 606 F.2d at 501-502 (A. 40a, 42a)

The essence of this case is that proper "credit sale" disclosures, as required by TIL, would have made the credit purchase of a cancer insurance policy obvious to a customer. If Community had complied with TIL, sales of the cancer policies would, most likely, have been made only to those customers actually desiring to purchase such insurance coverage. As the district court found, this type of violation "lies at the heart of the policies behind Truth-in-Lending". (A. 26a)

There is no basis for granting certiorari on this issue. The complex fact pattern of this case gave rise to a highly unusual practice which presented an issue on which there are no other circuit cases. Without other decisions on this "credit sale" issue, that issue is not ripe for review by this Court. Nor is it

sufficiently important to the over-all structure of the law, or to the development of TIL law, for this Court to grant certiorari.

3. The Court of Appeals' decision is correct and in accord with this Court's recent TIL decision. Community's dual function of merchandising the cancer policies and extending credit for the purchase, is a loan and cash sale for state-law purposes. However, for purposes of TIL, Community made a "credit sale".

A "credit sale" for TIL purposes is expressly defined by statutory and regulatory provisions. (A. H) Under 15 U.S.C. §1602(g) and 12 C.F.R. §226.2(t),the term "credit sale" is defined as "any sale with respect to which credit is extended or arranged by the seller". (A. 70a) The sale of insurance is clearly a "sale" within this definition; and Community admittedly "extended" credit to the purchasers of the cancer insurance policies. The only question that the Fifth Circuit had to decide was whether Community was a "seller" within the meaning of 1602(g). The Fifth Circuit found four separate grounds upon which Community should be characterized as a "seller" for purposes of



TIL. Cody, 606 F.2d at 505-507 (A. 49a-53a) This Fifth Circuit decision concurs with a Federal Reserve Board letter covering the sale and financing of non-credit insurance by an insurance agent. (A. 4a n.2) That FRB letter states:

> This responds to your letter of August 7, 1969 and to ***'s of September 8, 1969, both of which inquired as to what type of disclosures an insurance broker or agent who handles the insurance and finances the premium could make. In our opinion, an insurance agent is selling insurance. Consequently, when he also provides consumer credit for premium financing, he is making a credit sale under §226.2(n) [now §226.2(t)] and disclosures under §226.8(b) and (c) would be required.

CCH Consumer Credit Guide ¶30,257 (transfer binder) (excerpts from FRB letter of January 5, 1970, No. 225 by Frederic Solomon, Director) (emphasis added) (A. 4a n.2) Accordingly, this Fifth Circuit decision is in full accord with this Court's recent

TIL decision which held that such FRB letters should be followed by the courts. Ford Motor Credit Company v. Milhollin, _____U.S. _____, 100 S.Ct. 709 (1980)

B. The TIL "Penalties" Issue.

The second TIL issue upon which Community is seeking certiorari is: Whether the TILA's pre-October-1974-penalty provisions authorize more than one penalty award on a single credit transaction involving multiple obligors in a class action. (Pet. 3)

The plaintiffs will show below that certiorari should be denied.

1. The issue presented is not of sufficient importance for this Court to grant certiorari since Congress subsequently amended the TIL penalty provision as to class actions. The TIL issue is controlled by a prior version of 15 U.S.C. §1640(a), which prescribed the applicable TIL penalty in individual, as well as,class actions. The text of that provision is set out at A.76a.

Under the version of 15 U.S.C. §1640(a) in effect when this suit was brought, a creditor in a consumer credit transaction who fails to disclose to any person any information required to be disclosed is



liable to that person for an amount ranging from $100 to $1000--based on twice the finance charge. Cody, 606 F.2d at 507 (A. 54a-55a) The district court below certified a class and held that each plaintiff/obligor was entitled to a separate minimum penalty of $100. Cody, 606 F.2d at 502, 507-508 (A. 42a, 54a-55a)

The TIL penalty provision was amended in 1974 and 1976. This provision, as amended, is set out under "Statutes Involved" at pages 3-5, supra, of plaintiffs' brief.

These amendments altered the penalty provisions, especially as they affect class actions. Under the amendments, a district court is given broad flexibility. For example, in a class action, a district court may award "such amount as the court may allow" with an overall ceiling. 15 U.S.C. §1640(a)(3). Furthermore, in determining the amount of award in any class action, the court is to "consider among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failure of compliance by the creditor, the resources of the creditor, the number of persons adversely affected,

and the extent to which the creditor's failure of compliance was intentional". 15 U.S.C. §1640(a)(3)

This judicial flexibility for penalties in class actions, however, does not apply in the instant case. This is so because the parties to this case stipulated that the amendments were not applicable to this action. Cody, 606 F.2d at 507 n.17 (A. 54a n.17)

In light of the amendments, this issue is not of sufficient importance for this Court to grant certiorari. The instant case is probably the only pending case involving the issue of the proper construction of the pre-October-1974-penalty to a class action.

Additionally, the issue of whether the TIL penalty, as amended, provides for multiple liability in an individual action would be better addressed in an individual action than in this class action. And, the argument that the creditors are in need of a resolution to this issue, is specious. A creditor might modify its disclosures or other conduct based on a decision by this Court as to matters which might prevent its liability. But it cannot be seriously



argued that a creditor would alter its conduct based on a decision of this Court that its liability is, for example, $100 on a transaction, rather than $200 (i.e., $100 to the husband and $100 to the wife). If the creditor was actually inclined to change its practices, it could avoid the problem by only having one spouse become obligated on a transaction.

## III. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied as to all issues.

Respectfully submitted,

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